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Giving Families Their Best Shot: A Law-Medicine Perspective on the Right to Religious Exemptions from Mandatory Vaccination

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— Note —

GIVING FAMILIES THEIR BEST SHOT: A LAW-MEDICINE PERSPECTIVE ON THE RIGHT TO RELIGIOUS EXEMPTIONS FROM MANDATORY VACCINATION

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INTRODUCTION

In a Republican presidential primary debate in 2011, United States Representative Michele Bachmann brought the age-old vaccine controversy into the national limelight when she said the vaccine that prevents the sexually transmitted infection (STI) Human Papilloma Virus (HPV) was "dangerous"—a surprisingly widespread sentiment about vaccines in general.[1] Many states have proposed legislation to make the HPV vaccine a mandatory prerequisite for children entering school; Virginia and the District of Columbia have enacted such legislation.[2] But for those who distrust vaccines, the HPV vaccine is no exception.[3] Michele Boettiger, a Texas mother of three girls, worried about the safety of the vaccine and the message sent regarding sexual freedom, especially because her Roman Catholic background taught her to "believe[] in abstinence until marriage."[4] Others have similar safety and religious concerns with vaccinations, even compulsory school vaccinations.[5] Thus, many states allow exemptions from mandatory school vaccinations, although the laws vary widely. In some states, all a parent has to do is assert that vaccines are contrary to their religious belief to receive an exemption.[6]

1. Denise Grady, *Remark on Vaccine Could Ripple for Years*, N.Y. TIMES, Sept. 20, 2011, at D1 (describing public health officials' concerns that Bachmann's statements would decrease the already low numbers of those using the HPV vaccine).

2. *See HPV Vaccine: State Legislation and Statutes*, NAT'L CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/issues-research/health/hpv-vaccine-state-legislation-and-statutes.aspx (last updated Feb. 2013) [hereinafter NCSL] (providing information on states that have proposed and enacted mandatory HPV vaccine legislation, as well as proposed legislation to repeal the enacted HPV legislation).

3. Grady, *supra* note 1.

4. *Id.*

5. *See, e.g.*, Steve Leblanc, *Parents Use Religion to Avoid Vaccines*, USA TODAY (Oct. 10, 2007, 4:31 AM), http://usatoday30.usatoday.com/news/health/2007-10-18-religion-vaccines_N.htm (portraying Sabrina Rahim's fear that vaccination caused her son's autism, which led her to sign a letter claiming that, because of her deeply held religious beliefs, she wanted her four-year-old son exempted from compulsory vaccinations so he could enter preschool—even though Rahim does not practice any specific faith); *cf.* Steve P. Calandrillo, *Vanishing Vaccinations: Why Are So Many Americans Opting Out of Vaccinating Their Children?*, 37 U. MICH. J.L. REFORM 353, 413, 422 (2004) (naming several religious groups that prohibit vaccinations for their members).

6. Pediatrician Dr. Janet Levitan of Massachusetts counsels worried parents to pursue a religious exemption because "[the law] says you have to state that vaccination conflicts with your religious belief. It doesn't say you have to actually have that religious belief. So just state it." Leblanc, *supra* note 5.

In other states, no exemptions are allowed. As new vaccines are continuously developed, the nation's long-standing and widespread distrust of vaccinations, with concerns ranging from vaccine safety to conscientious objection, seems to be on the rise.[7]

New advances in technology have led to vaccines targeting viruses such as the incurable but preventable HPV, an STI that has a strong link to cervical, oral, and anogenital cancers as well as genital warts.[8] As public officials quickly convert these biomedical developments from recommended vaccines, like the HPV vaccine, into mandatory ones, which is where many state governments seem to be headed, new legal frameworks need to be created.[9] But the formation of these new legal frameworks raises central constitutional and policy questions, including: (1) whether the Constitution requires states to provide exemptions from compulsory vaccinations; (2) if the Constitution does not require exemptions, whether states should provide those exemptions; and (3) if states do provide exemptions, what the legal framework should be. The United States Supreme Court has not directly addressed the constitutionality of mandatory versus

7. The Centers for Disease Control and Prevention's (CDC) National Immunization Survey found that in 2008 nearly 40 percent of American parents refused or delayed giving their young children at least one vaccine shot, which was a significant increase from 22 percent in 2003. Liz Szabo, *Refusing Kids' Vaccine More Common Among Parents*, USA TODAY (May 3, 2010, 8:35 PM), http://www.usatoday.com/news/health/2010-05-04-vaccines04_ST_N.htm. Additionally, a quarter of American parents believe vaccines cause autism. *Id.* Whether vaccines actually cause autism is a source of controversy. *Compare* DAVID KIRBY, EVIDENCE OF HARM: MERCURY IN VACCINES AND THE AUTISM EPIDEMIC: A MEDICAL CONTROVERSY, at xii (2005) (discussing mercury and thimerosal content in vaccines and the suspected link to autism), *with* PAUL A. OFFIT, AUTISM'S FALSE PROPHETS: BAD SCIENCE, RISKY MEDICINE, AND THE SEARCH FOR A CURE 36–46 (2008) (describing research debunking the theory that vaccination causes autism, and explaining why parents believe the "vaccine causes autism" narrative).

8. Lauri E. Markowitz et al., *Quadrivalent Human Papillomavirus Vaccine: Recommendations of the Advisory Committee on Immunization Practices (ACIP)*, MORBIDITY & MORTALITY WKLY. REP., Mar. 23, 2007, at 1, 1; *see also* Gardiner Harris, *Panel Endorses HPV Vaccines for Boys of 11*, N.Y. TIMES, Oct. 26, 2011, at A1 (identifying other cancers linked to HPV).

9. The Advisory Committee on Immunization Practices (ACIP) recommends routine vaccination of three doses for girls beginning at age nine and catch-up vaccination for unvaccinated females aged thirteen to twenty-six. *See Press Briefing Transcript: ACIP Recommends All Eleven- to Twelve-Year-Old Males Get Vaccinated Against HPV*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Oct. 25, 2011, 12:45 PM), http://www.cdc.gov/media/releases/2011/t1025_hpv_12yroldvaccine.html (describing the most recent ACIP recommendations).

permissive exemptions from compulsory vaccination laws.[10] Because case law, legislation, administrative decisions, and scholarly discourse regarding exemptions from compulsory vaccination laws offer few concrete conclusions,[11] this issue requires further analysis.

This Note addresses exemptions from compulsory vaccination laws. Part I provides historical context to the age-old vaccine controversy and introduces current-day issues that add another layer of complexity to the vaccine narrative. Part II lays out the relevant legal principles that govern compulsory vaccination laws: the Supreme Court public health and free exercise jurisprudence as well as the state statutory frameworks. Part III describes the overly broad interpretations of the Supreme Court jurisprudence at the lower court level and the lower courts' confusion in addressing the constitutionality of a free exercise exemption. Part IV explores four avenues, advocating for the one that allows for exemptions in a certain set of circumstances. Part V sets up a novel three-tiered legal framework that addresses the law-medicine, constitutional, and policy levels of analysis.

Examination of these issues requires balancing the tension between constitutional law and public health law—and more specifically, individual liberty and police power. The Institute of Medicine (IOM) defines public health as "what we, as a society, do collectively to assure the conditions for people to be healthy."[12] This broad definition clearly encompasses mandatory vaccination laws.[13] Mandatory vaccination advocates often quote the common law maxim

10. *See* Jacobson v. Massachusetts, 197 U.S. 11, 25 (1905) (holding that compulsory vaccination laws fall within a state's police powers); Caviezel v. Great Neck Pub. Schs., 739 F. Supp. 2d 273, 283 (E.D.N.Y. 2010) ("Neither the . . . Supreme Court nor the Court of Appeals for the Second Circuit has directly addressed whether a religious objector is constitutionally exempt from a program of mandatory vaccination.").

11. *See infra* Part II.C; *see also* William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RES. L. REV. 357, 400 (1990) (arguing against the constitutionally compelled free-exercise exemption because it "sets forth a false dichotomy between secular and religious belief systems and ignores the similarity of their functions . . . in the political and social environment"); Daniel A. Salmon & Andrew W. Siegel, *Religious and Philosophical Exemptions from Vaccination Requirements and Lessons Learned from Conscientious Objectors from Conscription*, 116 PUB. HEALTH REP. 289, 292 (2001) (arguing for the free-exercise exemption in the context of compulsory vaccination laws using conscientious objection from conscription as a model); *infra* Part III.

12. COMM. FOR THE STUDY OF THE FUTURE OF PUB. HEALTH, THE FUTURE OF PUBLIC HEALTH 19 (1988).

13. IAN GLYNN & JENIFER GLYNN, THE LIFE AND DEATH OF SMALLPOX 135–42 (2004).

salus populi suprema lex est, "the welfare of the people is the supreme law," to uphold a wide scope for the state's police power.[14] But just as vaccinations have been prevalent for centuries, antivaccinationism is "as old as vaccination itself."[15] Compulsory vaccination involves invasive medical technology that has potential risks. Thus, a more sophisticated legal framework needs to be established to accommodate new biomedical developments that are present in vaccination technology.

I. DEFINING THE PROBLEM: THE VACCINE CONTROVERSY

Resistors to vaccines have often thought of vaccinations as a "greater risk to life and limb" than getting sick.[16] Although creating a framework where vaccinationists and public health advocates are the heroes and antivaccinationists are the villains may be easier, the narrative of the vaccine controversy is far more complex.[17] The earliest anti-vaccine campaigns date back as far as the earliest mandatory vaccine campaigns.[18] Although English physician Edward Jenner's first experiments with smallpox vaccination took place in 1796, vaccination entered into American discourse with the smallpox outbreaks in the United States in 1898.[19] State and local governments responded to those outbreaks by campaigning and requiring citizens to submit to vaccinations, which caused antivaccination movements across the nation.[20]

In 1901, Cleveland made national news when its health officer, Martin Friedrich, who led vaccination campaigns across the city,[21]

14. MICHAEL WILLRICH, POX 301 (2011).

15. *Id.* at 262 (noting that antivaccine protests began two years before the first vaccination was performed in the United States).

16. *Id.* at 12.

17. *Compare* Gregory A. Poland & Robert M. Jacobson, *The Age-Old Struggle Against the Antivaccinationists*, 364 NEW ENG. J. MED. 97, 98 (2011) (describing anti-vaccinationists as scientifically ignorant or radical extremists who deliberately misguide the public through false data and violence), *with* WILLRICH, *supra* note 14, at 344–45 (warning readers to be cautious about judging the "innumerable people" around the world who greet scientific innovation with "skepticism, resentment, or steadfast resistance," because "[t]o dismiss so many people as merely ignorant and irrational is worse than intolerant").

18. WILLRICH, *supra* note 14, at 39.

19. *Id.* at 21.

20. *Id.* at 39 (noting that early compulsory vaccination efforts ran up against "strong, even violent, antivaccination movements").

21. Compulsory vaccination was the national policy in Friedrich's native country of Germany. *Id.* at 238.

became "a reluctant hero of the antivaccination movement."[22] After witnessing individuals whom he had compelled to be vaccinated fall ill and die of tetanus, Friedrich stopped the vaccinations and ordered all patients infected with smallpox to be isolated from the overall population.[23] Instead of using vaccinations, Friedrich disinfected homes in the city with formaldehyde generators for months, and by the end of 1901 he seemed to have smallpox controlled.[24] Unfortunately, the success was temporary.[25] A homeless man from New Jersey entered Cleveland and swept the city with smallpox a year later; in the end, Friedrich cautiously tested vaccines for safety and reliability and finally stamped out the smallpox after two more years.[26] Thus, it was not only "old cranks" and "radicals" who had concerns about vaccinations—as many vaccination proponents claimed.

Despite public unrest with the idea of compulsory vaccinations, by 1942 nine states and the Territory of Alaska had enacted laws mandating vaccinations for diphtheria.[27] From 1958 to 1965, all fifty states enacted new legislation requiring school children to undergo vaccination for smallpox and other diseases.[28] But by 1971 there had been "no reported cases of smallpox in the United States in more than twenty years, [causing] the annual tally of six to eight deaths from complications of vaccination [to become] increasingly unacceptable."[29] As such, the U.S. Public Health Service recommended discontinuation of childhood vaccination against smallpox.[30] "Within three years, every . . . state had repealed its smallpox vaccination mandate for schoolchildren."[31] Even with the rise and fall in public trust of vaccines, mandatory school vaccines have been required for years and

22. *Id.* at 239 (noting that Friedrich felt that vaccines were "unreliable at best, toxic at worst"); *see also* Martin Friedrich, *How We Rid Cleveland of Smallpox*, 1 CLEV. MED. J. 77, 88 (1902) ("A man would have to have a heart of stone if he would not melt at the sight of the misery [vaccines] produce.").

23. WILLRICH, *supra* note 14, at 239.

24. Friedrich, *supra* note 22, at 89.

25. WILLRICH, *supra* note 14, at 239.

26. *Id.* at 240.

27. Charles L. Jackson, *State Laws on Compulsory Immunization in the United States*, 84 PUB. HEALTH REP. 787, 788 (1969).

28. *Id.* at 789.

29. WILLRICH, *supra* note 14, at 339.

30. The U.S. Public Health Service instead recommended smallpox vaccinations only for those adults or children who would be traveling to smallpox-prone areas. C. Henry Kempe, *The End of Routine Smallpox Vaccination in the United States*, 49 PEDIATRICS 489, 489–92 (1972).

31. WILLRICH, *supra* note 14, at 340.

are associated with successful reduction of infectious disease and establishment of herd immunity, which occurs when a threshold of vaccinated individuals is reached so that others may not need to be vaccinated to maintain a population of healthy individuals.[32]

Compulsory school vaccination laws did not force children to get vaccinated; they only prevented unvaccinated children from being permitted to enroll in a public school.[33] This form of compulsion, however, leaves parents with only a few options, like homeschooling or private school—neither of which may be desirable. Thus, these issues have been especially important to parents.[34] The enacted and proposed compulsory vaccination program laws vary widely and are inconsistent in their application: some do not speak to exemptions at all and others allow medical, religious, or philosophical exemptions.[35] Some courts hold that there is no right to a religious exemption from mandatory school vaccinations, while others state that there is such a constitutional right.[36]

II. MANDATORY VACCINATION AND FREE EXERCISE LEGAL FRAMEWORK

The current legal framework for analyzing religious exemptions from mandatory school vaccination laws is composed of (1) the Supreme Court's case law on public health, (2) the Court's case law on free exercise and religion, and (3) each state's statutes governing compulsory school vaccination laws. Each of these legal components, including their inadequacies, is discussed below.

A. The Supreme Court's Public Health Jurisprudence

When analyzing a challenge to mandatory vaccinations, most courts and legal scholars point to the foundational early twentieth-

32. *See* JACOB HELLER, THE VACCINE NARRATIVE 11 (2008) (discussing and explaining herd immunity); *see also* Alan R. Hinman et al., *Childhood Immunization: Laws That Work*, 30 J.L. MED. & ETHICS 122, 125 (2002) (describing the concept of herd immunity by discussing how "[m]ost vaccines provide . . . protection" through vaccinating "a large enough proportion of individuals" so as to "indirectly [protect individuals] who are not immunized").

33. WILLRICH, *supra* note 14, at 229.

34. *See* Leblanc, *supra* note 5 (showing the extent to which a parent may go to avoid vaccination but still get his or her child into preschool).

35. KATHLEEN S. SWENDIMAN, CONG. RES. SERV., RS21414, MANDATORY VACCINATIONS: PRECEDENT AND CURRENT LAWS 3 (2011).

36. *See* Caviezel v. Great Neck Pub. Schs., 739 F. Supp. 2d 273, 283 (E.D.N.Y. 2010) (listing court decisions supporting the right to a religious exemption from compulsory school vaccination and decisions holding the opposite); *see also infra* Part III.

century Supreme Court case *Jacobson v. Massachusetts*.[37] In *Jacobson*, the Massachusetts legislature had enacted a vaccination statute to protect against smallpox.[38] This statute addressed an increase in smallpox in the city of Cambridge and required inhabitants to be vaccinated.[39] Reverend Henning Jacobson of the Swedish Lutheran Church refused to be vaccinated because his son had suffered negative results from vaccines in the past.[40] The Supreme Court held that public health and public safety laws fall under the umbrella of a state's police power—a major holding that serves as the foundation of public health jurisprudence.[41] Thus, the Supreme Court upheld the Massachusetts statute requiring Cambridge inhabitants to be vaccinated against smallpox, concluding that the legislation was a valid exercise of the state's police power and not an invasion of any constitutional rights.[42]

The second Supreme Court case on compulsory vaccination laws, *Zucht v. King*, was decided in 1922.[43] In *Zucht*, Texas public officials excluded a girl from both a public and a private school because she did not have the required vaccination certificate and refused to be vaccinated.[44] The Supreme Court extended the *Jacobson* holding to allow for mandatory vaccination as a prerequisite to school attendance.[45] The Court stated that municipal officials had "broad discretion in matters affecting the application and enforcement of a health law."[46] The Court distinguished Zucht's case from *Yick Wo v. Hopkins*,[47] in which the Court concluded that the public officials administrating an ordinance had an "unequal and oppressive" intent when they denied 200 petitions for waivers by Chinese persons and

37. Jacobson v. Massachusetts, 197 U.S. 11 (1905).

38. *Id.* at 12–13.

39. *Id.* at 12.

40. *Id.* at 17 (both Jacobson and his son had experienced illness following previous vaccinations, which Jacobson argued was proof of a hereditary condition that would cause their systems to "rebel against the introduction of the vaccine").

41. *Id.* at 24–25 ("According to settled principles the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.").

42. *Id.* at 38.

43. Zucht v. King, 260 U.S. 174 (1922).

44. *Id.* at 175.

45. *Id.* at 176 (explaining that compulsory vaccination falls under the state's police power).

46. *Id.* (citing Lieberman v. Van De Carr, 199 U.S. 552 (1905)).

47. Yick Wo v. Hopkins, 118 U.S. 356 (1886).

only denied one petition by a non-Chinese person.[48] The Court differentiated *Zucht* from *Yick Wo*, as *Yick Wo* held that the officials exercised arbitrary power and denied the plaintiff equal protection of laws,[49] whereas the *Zucht* Court stated that there was "broad discretion required for the protection of the public health," and upheld the compulsory vaccination ordinance.[50] The *Zucht* Court offered a cursory analysis with little insight as to the limitations of the *Jacobson* decision.[51] But *Zucht* and *Jacobson* are the bases for state and local mandatory school vaccination laws.[52] But it is unclear what the impact on the Court's public health jurisprudence would be if a plaintiff, like Jacobson, came forward with a free exercise challenge that a mandatory vaccine violated his or her sincerely held religious belief. Perhaps the outcome would be different under such circumstances.

B. The Supreme Court's Free Exercise Jurisprudence

This Note will focus on parental claims to religious exemptions under the Free Exercise Clause from mandatory vaccinations for their children. The First Amendment begins: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[53] A number of organized religious sects object to mandatory vaccination: the Amish, Jehovah's Witnesses, and Christian Scientists, among others.[54] But whether or not the religious grounds are based on doctrines of organized belief is irrelevant.[55] Rather, courts look at the sincerity of the person's belief, not the truth of that belief.[56] Although

48. *Id.* at 373–74 (finding a denial of equal treatment where the ordinance required laundries without waivers to be located in certain types of buildings).

49. *Id.*

50. 260 U.S. at 177 ("Unlike *Yick Wo v. Hopkins* . . . these ordinances confer not arbitrary power . . . .").

51. *Id.* at 176–77.

52. *See infra* Parts III.B, III.C, III.D.

53. U.S. CONST. amend. I. The Free Exercise Clause has been applied to the states through its incorporation into the Fourteenth Amendment's Due Process Clause. *See* Cantwell v. Connecticut, 310 U.S. 296 (1940).

54. *Cf.* Calandrillo, *supra* note 5, at 356, 423, 430 (describing the pockets of religious groups that opted out of vaccinations).

55. *See* Thomas v. Review Bd., 450 U.S. 707, 713–14 (1981) ("[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.").

56. *See, e.g.*, United States v. Ballard, 322 U.S. 78, 86–88 (1944) (concluding that "the District Court ruled properly when it withheld from the jury all questions concerning the truth or falsity of the religious beliefs or doctrines of respondents" because "[m]en may believe what they cannot prove").

these themes have been consistent, free exercise jurisprudence has evolved with Supreme Court decisions over the years.

1. The Definition of Religion

The primary context in which the Supreme Court has considered the definition of religion has been decisions regarding the conscientious-objector exemption from the military draft, rather than in the public health context. Early on, the Court rejected students' claims for religious exemption from university military training courses in *Hamilton v. Regents of the University of California*, stating that conscientious-objector status was a privilege that came "not from the Constitution but from the acts of Congress."[57] Subsequently, in *United States v. Seeger*,[58] the Court interpreted a section of the Universal Military Training and Selective Service Act exempting individuals "who, by reason of religious training and belief, [are] conscientiously opposed to participation in war in any form."[59] The Act defined "religious training and belief" as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but [not including] essentially political, sociological, or philosophical views or a merely personal moral code."[60]

In *Seeger*, the Court considered three consolidated cases involving applicants who sought a religious exemption from the military draft but did not necessarily believe in a "Supreme Being."[61] The Court ultimately held that "the test of belief in a relation to a Supreme Being is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption."[62] Thus, the Court broadly included the applicants' nontheistic views into the Act's definition of religion.

Welsh v. United States also involved an applicant seeking an exemption from the draft under the Act; however, this individual crossed out "religious training" on his form.[63] Justice Black's plurality

57. Hamilton v. Regents of the Univ. of California, 293 U.S. 245, 264 (1934) ("[Congress] may grant or withhold the exemption as . . . it sees fit; and if it be withheld, the native-born conscientious objector cannot successfully assert the privilege.").

58. United States v. Seeger, 380 U.S. 163 (1965).

59. 50 U.S.C. § 456(j) (2006).

60. *Id.*

61. *Seeger*, 380 U.S. at 165–69.

62. *Id.* at 165–66 (internal quotation omitted).

63. Welsh v. United States, 398 U.S. 333, 337 (1970) (noting that while "religious training" was struck from Welsh's application because of his uncertainty regarding the existence of a Supreme Being, his "deep

opinion in *Welsh* concluded that *Seeger* was still controlling because the individual "strongly believed that killing in war was wrong, unethical, and immoral, and [his] conscience[ ] forbade [him] to take part in such an evil practice."[64] Black continued,

> If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, those beliefs certainly occupy in the life of that individual "a place parallel to that filled by . . . God" in traditionally religious persons.[65]

In both *Seeger* and *Welsh*, there was no doubt as to the depth and sincerity of the individuals' beliefs as a conscientious objector.[66] Thus, in these cases, the Court extended a broad definition of religion that protected exemptions based on sincere moral convictions, regardless of whether they were grounded in religion or philosophy. However, *Gillette v. United States* interpreted the Act as allowing exemptions only for those who conscientiously object to all war and not to a particular war, and for this reason rejected the plaintiff's request for conscientious-objector status.[67]

These conscientious-objector exemption cases, although far from specific and instructive, provide courts and state legislatures with a starting point for how to approach defining a religious exemption.[68] Although conscientious-objection exemptions from the military draft are not identical to religious exemptions from compulsory vaccination laws, the approach for granting conscientious-objection status has valuable similarities and lessons.[69]

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conscientious scruples against taking part in wars where people were killed" was nevertheless certain).

64. *Id.*

65. *Id.* at 340.

66. *Id.* at 337.

67. Gillette v. United States, 401 U.S. 437 (1971). The *Gillette* Court rejected the conscientious objector status claim because "Congress intended to exempt persons who oppose participating in all war . . . and that persons who object solely to participation in a particular war are not within the [exemption's purview], even though the latter objection may have such roots . . . that it is 'religious' in character." *Id.* at 447.

68. *See, e.g.*, Salmon & Siegel, *supra* note 11, at 289 (providing a foundation for the application of conscientious objection from conscription to exemption from compulsory vaccination laws).

69. *See infra* Part III.B.

2. The *Smith* Standard

A crucial controversy in free exercise jurisprudence that is also applicable to religious exemption claims is the level of scrutiny to apply. This Note will argue that the level of scrutiny should vary with respect to different vaccines and will suggest a certain standard. But first an examination of the current legal state of scrutiny analysis in free exercise claims is necessary.

In *Sherbert v. Verner*, the Supreme Court held that strict scrutiny was the appropriate standard for evaluating laws burdening religious freedom.[70] This case arose from a state's denial of unemployment benefits to a woman who was a member of the Seventh-day Adventist Church and quit her job instead of working on the Saturday Sabbath.[71] The Court concluded that denying benefits imposed a substantial burden on her because it forced her to choose between her income and her faith.[72] The issue was whether there was a compelling government interest that the statute's religious eligibility provisions promoted, which justified substantially impinging her First Amendment right.[73] The Court held that there was no compelling interest, and so denying benefits violated the plaintiff's free exercise rights.[74]

In 1990, the Supreme Court decided *Employment Division v. Smith*,[75] which some argue drastically shrank the power and scope of the Free Exercise Clause.[76] In *Smith*, two individuals were fired by a private drug rehabilitation organization because they ingested peyote, a hallucinogenic drug, as part of a religious ritual for the Native American Church.[77] Because they were fired for "misconduct," Oregon denied them unemployment benefits.[78] Oregon law prohibited the "knowing or intentional possession" of a "controlled substance" unless a medical practitioner authorized and prescribed such usage, with no

70. Sherbert v. Verner, 374 U.S. 398, 406 (1963).

71. *Id.* at 399–400.

72. *Id.*

73. *Id.*

74. *Id.* at 406–07.

75. Emp't Div. v. Smith, 494 U.S. 872 (1990).

76. Some scholars argue that *Smith* was not such a shift from precedent, while others disagree. *Compare* Marci A. Hamilton, Employment Division v. Smith *at the Supreme Court: The Justices, the Litigants, and the Doctrinal Discourse*, 32 CARDOZO L. REV. 1671, 1674 (2011), *with* Steven D. Smith, *Free Exercise Doctrine and the Discourse of Disrespect*, 65 U. COLO. L. REV. 519, 575 (1994) (stating that the *Smith* Court "chose . . . to promote an advocacy of intolerance").

77. 494 U.S. at 874.

78. *Id.*

exception for religiously inspired use.[79] The Court decided that the Free Exercise Clause allowed the state to prohibit peyote use even for religious purposes; thus, the Court upheld the denial of unemployment benefits.[80] More generally, *Smith* held that the Free Exercise Clause cannot be used to challenge a neutral law of general applicability.[81] Under this holding, even if a law burdens religious practices, so long as the law does not single out religious practices for punishment and is not motivated by the desire to interfere with individuals' right to practice religion, it is likely constitutional.

The Supreme Court interpreted and applied *Smith* in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.[82] In *Hialeah*, the Court held that a city ordinance, which barred "[killing, slaughtering, or sacrificing] animals for any type of ritual, regardless of whether or not the flesh or blood of the animal is to be consumed,"[83] was unconstitutional because its obvious purpose was to prohibit a religious practice.[84] The Court reaffirmed *Smith*, stating that a neutral and generally applicable law does not have to be "justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice."[85] But if a law does not satisfy the *Smith* requirements, then enforcement of the law has to be "narrowly tailored to advance that interest."[86]

The City of Hialeah enacted the ordinance in response to the Santeria Church's announcement that it was establishing a school, cultural center, and museum to bring its practices (including ritual sacrifice) into the open.[87] The ordinance specifically referred to "sacrifice" and "ritual" and made exceptions for other types of animal sacrifice.[88] Thus, the Court concluded that the law lacked neutrality because its objective was to stop the practice of the Santeria religion.[89] The Court also ruled that the law was not one of "general

79. *Id.* at 874, 876.

80. *Id.* at 890.

81. *Id.* at 879.

82. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

83. *Id.* at 527.

84. *Id.* at 526 (noting that the ordinance was enacted in reaction to moral concerns by certain residents of the city against Santeria).

85. *Id.* at 531 (citing *Smith*, 494 U.S. at 872).

86. *Id.* at 531–32.

87. *Id.* at 526.

88. *Id.* at 536–37 (pointing out exemptions in the ordinance, including one for kosher slaughter, which acted as a "gerrymander" that targeted only the Santeria religion).

89. *Id.* at 534–35.

applicability," because even though "the city's proffered interest" included preventing animal cruelty, ensuring sanitary disposal of animal carcasses, and avoiding the consumption of uninspected meat,[90] the ordinance did not prohibit other animal killings besides religious sacrifice.[91] Since the government could achieve its goals without burdening the Santeria practices, the law was unconstitutional.[92] Therefore, after *Smith* and its application in *Hialeah,* free exercise rights are not violated by a neutral law of general applicability unless rational basis review is not satisfied; conversely, a law not of general applicability would be found unconstitutional if it did not meet strict scrutiny.

3. The Hybrid-Rights Exception to *Smith*

Relevant to the issue of religious exemptions for vaccinations, the Supreme Court has denied free exercise rights and allowed religious exemptions in certain contexts. In *Wisconsin v. Yoder*, the Court held that Amish parents had the right to an exemption from compulsory school laws for their fourteen- and fifteen-year-old children under the Free Exercise Clause.[93] The Court said that the Amish objected to education beyond the eighth grade because what is taught in schools is in "marked variance" with Amish values and ways of life.[94] The Court found that the compulsory attendance laws infringed on the Amish parents' rights to control the upbringing of their children and that "the traditional way of life" for the Amish was not a matter of "personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living."[95] The Court concluded that the Wisconsin law "affirmatively" compelled the Amish parents, "under threat of criminal sanction," to act in a way "at odds with . . . their religious beliefs" and destroyed their free exercise rights.[96] Therefore, *Yoder* applied a strict scrutiny standard in this case in favor of the Amish parents.[97]

The majority in *Smith* distinguished *Smith* from *Yoder* and other cases in which strict scrutiny had been the standard by saying the

90. *Id.* at 543–45.

91. *Id.* at 543.

92. *Id.* at 546 (finding that the government could narrow the ordinance to achieve the same interests without placing a large burden on religion).

93. Wisconsin v. Yoder, 406 U.S. 205, 207, 235 (1972).

94. *Id.* at 210–11.

95. *Id.* at 216.

96. *Id.* at 218–19.

97. *Id.* at 215.

latter were "hybrid" cases.[98] These hybrid-rights cases included claims in which a free exercise action was connected with other assertions of constitutional protections, such as freedom of speech or the right of parents to direct the education of their children.[99] The *Smith* majority deemed those types of cases as ones in which to apply the strict scrutiny standard.[100] But cases that were not considered hybrid and claimed exemptions from a neutral, generally applicable law would not be evaluated under that high standard.[101]

In the wake of *Smith*, courts have ruled that simply adding another constitutional claim to a free exercise claim does not necessarily implicate strict scrutiny analysis.[102] The Court in *Smith* cited *Prince v. Massachusetts*,[103] a case that contained both a free-exercise and an equal-protection claim.[104] The case also addressed the tension between public health law and free-exercise claims.[105] The *Prince* Court upheld Massachusetts's child labor regulations against a woman who allowed her children to distribute and sell magazines that

98. Emp't Div. v. Smith, 494 U.S. 872, 881–82 (1990). Justice Scalia's majority opinion in *Smith* examined the cases in which free-exercise challenges were upheld and revealed that none involved only free-exercise claims alone. *See, e.g.*, Murdock v. Pennsylvania, 319 U.S. 105, 121 (1943) (invalidating a flat license tax on solicitations when it was applied to religious disseminations because it infringed upon the free exercise of religion *and* freedom of speech and of the press); Cantwell v. Connecticut, 310 U.S. 296, 304–07 (1940) (striking down a licensing system that affected religious solicitations because it violated both the Free Exercise *and* Free Speech Clauses of the First Amendment).

99. 494 U.S. at 881–82; *see, e.g.*, *Yoder*, 406 U.S. at 218-19 (striking down application of compulsory school-attendance laws to Amish parents because it violated both the parents' freedom of religion and their liberty to control the education of their children under the First and Fourteenth Amendments).

100. 494 U.S. at 882–83.

101. *Id.* at 884.

102. *See, e.g.*, Miller v. Reed, 176 F.3d 1202, 1208 (9th Cir. 1999); Swanson v. Guthrie Indep. Sch. Dist., 135 F.3d 694, 699 (10th Cir. 1998); *compare* Littlefield v. Forney Indep. Sch. Dist., 108 F. Supp. 2d 681 (N.D. Tex. 2000) (applying rational basis review to a challenge against school uniforms based on the free exercise claim and the right of parents to control the upbringing of their children), *with* Hicks v. Halifax Cnty. Bd. of Educ., 93 F. Supp. 2d 649 (E.D.N.C. 1999) (applying strict scrutiny instead).

103. Prince v. Massachusetts, 321 U.S. 158 (1944), *cited in Smith*, 494 U.S. at 879–80.

104. *Id.* at 164.

105. *Id.* at 166–67 ("The right to practice religion freely does not include liberty to expose the community or the child to *communicable disease* or the latter to ill health or death.") (emphasis added).

preached the works of Jehovah's Witnesses on the street.[106] *Prince* stated that "Massachusetts has determined that an absolute prohibition, though one limited to streets and public places and to the incidental uses proscribed, is necessary to accomplish its legitimate objectives."[107] These objectives included "[a]cting to guard the general interest in youth's well being . . . as parens patriae."[108] Although the Supreme Court had not yet clearly and definitively utilized the doctrine of strict scrutiny as of *Prince*, this language is similar to what the Court later called "strict scrutiny."[109] Because there is currently precedent that hybrid-rights claims may potentially fail even in the face of strict scrutiny, the idea that the hybrid-rights exception would swallow the rule, as suggested by some judges and commentators, should not cause significant alarm.[110] Nothing in practice would be altered.

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106. *Id.* at 162.

107. *Id.* at 170; *see also id.* at 173–74 (Murphy, J., dissenting) ("The burden was . . . on . . . Massachusetts to prove the reasonableness and necessity of prohibiting children from engaging in [this type of religious activity and] . . . [i]f the right . . . to practice . . . religion in that manner is to be forbidden by constitutional means, there must be convincing proof that such a practice constitutes a grave and immediate danger to the state or to the health, morals or welfare of the child.").

108. *Id.* at 166.

109. The strict scrutiny standard was initially implied in the famous footnote four of *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938): "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution . . . which may call for a correspondingly more searching judicial inquiry." However, the formalized strict scrutiny analysis did not fully develop until decades after 1942. *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 799–800 (2006) ("The Supreme Court first used the precise term 'strict scrutiny' in 1942's *Skinner v. Oklahoma* . . . [but] in the development of constitutional doctrine in the decades after *Skinner*, Justice Douglas's phrase caught on and eventually became increasingly formalized into a two 'prong' test now referred to as 'strict scrutiny' . . . analysis.").

110. Justice Souter raised the concern that "[i]f a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule." Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 567 (1993) (Souter, J., concurring). This Note and other commentators conclude that a higher standard for the implication of another constitutional right ameliorates this concern. *See* Steven H. Aden & Lee J. Strang, *When a "Rule" Doesn't Rule: The Failure of the* Oregon Employment Division v. Smith *"Hybrid Rights Exception"*, 108 PENN ST. L. REV. 573, 588 (2003) ("[T]he approach utilized by the Ninth Circuit requiring plaintiffs to plead a colorable companion claim

But the fact that the analysis in *Prince* seems very close to strict scrutiny presents another twist. Justice Scalia used *Prince* to support his holding in *Smith.*[111] But as has been described above and as Justice O'Connor pointed out in her *Smith* concurrence,[112] the Court rejected claims like the one in *Prince* only after carefully considering the competing interests.[113] Therefore, the standard in *Prince* was not one of rational basis review but more like strict scrutiny.[114] The fact that the majority in *Smith* uses *Prince* as an example in support of rejecting exemptions from laws of neutral and general applicability is confusing. Thus, as has already been described and will be further examined, whether the strict scrutiny standard or *Smith's* seemingly rational basis review would apply and the availability of the hybrid-rights exception became questions that lower courts had difficulty applying.[115]

C. The States' Current Statutory Framework

The third source of law that governs mandatory vaccination cases is each state's statutory framework. Each state has varying statutes that require certain vaccines, and some provide for religious and philosophical exemptions.[116] All states allow medical exemptions.[117] These apply, for instance, if a student has a compromised immune

would seem to blunt much of the force of Justice Souter's critique of *Smith*'s hybrid claim exception.").

111. Justice Scalia wrote: "Subsequent decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." Emp't Div. v. Smith, 494 U.S. 872, 879 (1990) (internal quotation marks omitted); *see also id.* at 880 ("We found no constitutional infirmity in excluding [these children] from doing there what no other children may do.") (internal quotation marks omitted)).

112. *Id.* at 896 (O'Connor, J., concurring).

113. *Prince*, 321 U.S. at 166.

114. *Id.* at 170 (finding a "legitimate" government interest and the necessity of the prohibition); *cf.* Sarah L. Dunn, Note, *The "Art" of Procreation: Why Assisted Reproduction Technology Allows for the Preservation of Female Prisoners' Right to Procreate*, 70 FORDHAM L. REV. 2561, 2567 n.45 (2002) (stating that *Prince* used strict scrutiny analysis).

115. *See infra* Part V.B.

116. *See* Appendix. Table 1 lists the statutory requirements in each of the states and provides an overview of the states' requirements for compulsory school vaccination laws and the exemptions that are allowed.

117. *See* NCSL, *supra* note 2 (describing the exemptions that apply under state statutes).

system, an allergy to a vaccine, an illness at the time of vaccination, or medical contraindications to vaccines.[118] Almost all states and the District of Columbia currently allow religious exemptions[119]—only Mississippi and West Virginia do not.[120] Philosophical exemptions are provided by seventeen states.[121]

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118. *Id.* (describing the scenarios in which the medical exemptions apply).

119. ALA. CODE § 16-30-3 (2012); ALASKA ADMIN. CODE tit. 4, § 06.055 (2012); ARIZ. REV. STAT. ANN. § 15-873 (2009); ARK. CODE ANN. § 6-18-702 (2007); CAL. HEALTH & SAFETY CODE § 120365 (West 2012); COLO. REV. STAT. § 25-4-903 (2012); CONN. GEN. STAT. ANN. § 10-204a (West 2010); DEL. CODE ANN. tit. 14, § 131 (2007); D.C. CODE § 38-506 (LexisNexis 2007); FLA. STAT. ANN. § 1003.22 (West 2012); GA. CODE ANN. § 20-2-771 (2012); HAW. REV. STAT. § 2302A-1156 (2011); IDAHO CODE ANN. § 39-4802 (2011); 105 ILL. COMP. STAT. 5/27-8.1 (West 2012); IND. CODE ANN. § 21-40-5-6 (West 2008); IOWA CODE § 139A.8 (2011); KAN. STAT. ANN. § 72-5209 (2002); KY. REV. STAT. ANN. § 214.036 (West 2006); LA. REV. STAT. ANN. § 17:170(E) (2001); ME. REV. STAT. tit. 20A, § 6355 (2008); MD. CODE ANN., EDUC. § 7-403 (LexisNexis 2008); MASS. GEN. LAWS ch. 76, § 15 (West 2009); MICH. COMP. LAWS ANN. § 333.9215 (West 2012); MINN. STAT. ANN. § 121A.15 (West 2008); MO. REV. STAT. § 167.181 (West 2010); MONT. CODE ANN. § 20-5-405 (2011); NEB. REV. STAT. § 79-221 (2008); NEV. REV. STAT. ANN. § 392.437 (West 2011); N.H. REV. STAT. ANN. § 141-C:20-c (2005); N.J. STAT. ANN. § 26:1A09.1 (West 2007); N.M. STAT. ANN. § 24-5-3 (2006); N.Y. PUB. HEALTH LAW § 2164 (McKinney 2012); N.C. GEN. STAT. ANN. § 130A-155 (2011); N.D. CENT. CODE ANN. § 23-07-17.1 (2012); OHIO REV. CODE ANN. § 3313.671 (West 2005); OKLA. STAT. tit. 70, § 1210.192 (2010); OR. REV. STAT. ANN. § 433.267 (West 2011); 24 PA. STAT. ANN. § 13-303a (West 2006); R.I. GEN. LAWS § 16-38-2 (2001); S.C. CODE ANN. § 44-29-180 (2012); S.D. CODIFIED LAWS § 13-28-7.1 (2004); TENN. CODE ANN. § 49-6-5001 (2009); TEX. EDUC. CODE ANN. § 38.001(c)(1)(B) (West 2006); UTAH CODE ANN. § 53A-11-302 (West 2004); VT. STAT. ANN. § 1122 (2012); VA. CODE ANN. § 32.1-46(D)(1) (2011); WASH. REV. CODE § 28A.210.090 (2012); WIS. STAT. ANN. § 252.04 (West 2009); WYO. STAT. ANN. § 21-4-309 (West 2011).

120. *See* MISS. CODE ANN. § 41-23-37 (2009) (does not provide for religious exemption); W. VA. CODE ANN. § 16-3-4 (LexisNexis 2011) (same).

121. ARIZ. REV. STAT. ANN. § 15-873 (2009); CAL. HEALTH & SAFETY CODE § 120365 (West 2012); IDAHO CODE ANN. § 39-4802 (2011); LA. REV. STAT. ANN. § 17:170(E) (2001); ME. REV. STAT. tit. 20A, § 6355 (2008); MICH. COMP. LAWS ANN. § 333.9215 (West 2012); MINN. STAT. ANN. § 121A.15 (West 2008); NEB. REV. STAT. § 79-221 (2011); N.D. CENT. CODE ANN. § 23-07-17.1 (2012); OHIO REV. CODE ANN. § 3313.671 (West 2005); OKLA. STAT. tit. 70, § 1210.192 (2010); TEX. EDUC. CODE ANN. § 38.001(c)(1)(B) (West 2006); UTAH CODE ANN. § 53A-11-302 (West 2004); VT. STAT. ANN. § 1122 (2012); WASH. REV. CODE § 28A.210.090 (2012); WIS. STAT. ANN. § 252.04 (West 2009).

III. LOWER COURT DECISIONS IN DISARRAY: TO EXEMPT OR NOT TO EXEMPT

The introduction of mandatory vaccinations turned public schools in the United States "into theaters of conflict."[122] Before *Jacobson*, religious antivaccinationists garnered sympathy from courts.[123] After *Jacobson* and *Smith*, most cases in which parents have litigated to seek exemptions have not succeeded. This is not to say that parents have not received religious exemptions from compulsory school vaccination laws for their children. In fact, the statutes allowing exemptions vary, with some states requiring only a statement of opposition from the student, parent, or guardian.[124] An assessment of cases involving exemptions from compulsory vaccinations shows differing treatments by lower courts.

A. Avoiding the Constitutional Question: Exceeding Statutory Authority

Some courts have avoided answering the critical question of whether prohibiting a parent from obtaining exemptions from compulsory vaccination laws is unconstitutional by instead analyzing the scope of statutory authority. In other words, these courts looked at whether an official or a department had the authority to deny an exemption based on the language of the relevant statute. Thus, the court could reach a decision on whether rejecting the exemption was proper based entirely on statutory interpretation.

In *In re LePage*, a mother sought judicial review of the Wyoming Department of Health's denial of her request for a religious exemption from a school immunization requirement, the hepatitis B vaccine (HBV), for her daughter.[125] The issue was whether the Wyoming statute[126] required that an exemption from immunization be granted if there was a written religious objection or allowed the Department of Health to inquire into the sincerity of the petitioner's religious beliefs.[127] The Wyoming Supreme Court held that the Department of Health "exceeded its statutory authority" by inquiring into the sincerity of the mother's religious beliefs because the statute used

122. WILLRICH, *supra* note 14, at 230.

123. *E.g.*, Matthews v. Kalamazoo Bd. of Educ., 86 N.W. 1036 (Mich. 1901); State v. Hay, 35 S.E. 459 (N.C. 1900); Morris v. Columbus, 30 S.E. 850 (Ga. 1898); Potts v. Breen, 47 N.E. 81 (1897).

124. Leblanc, *supra* note 5.

125. *In re* LePage, 18 P.3d 1177, 1178–79 (Wyo. 2001).

126. WYO. STAT. ANN. § 21-4-309 (West 2011).

127. 18 P.3d at 1178.

mandatory language. Therefore, the exemption was "self-executing upon submission of a written objection."[128]

Similarly, in *Department of Health v. Curry*, the First District of the District Court of Appeals of Florida concluded that the state Department of Health exceeded its statutory authority, because the Florida statute[129] affords greater protection for "a parent's fundamental right to raise his or her child according to the religious tenets that he or she chooses" by "prohibiting any inquiry by the Department into the bona fides of the parent's or guardian's objection."[130] Thus, courts have used statutory construction and allocation of statutory authority to allow exemptions from compulsory school vaccination laws.[131]

B. Facing the Question: The Constitutional Free Exercise Right Exists

Courts addressing the constitutional questions have imposed a "present danger" standard and have impliedly supported the idea of a constitutional right to exemption.[132] In *Brown v. City School District of Corning*,[133] the trial court ruled that parents were entitled to the exemption specified in the New York statute, which stated that the mandatory vaccination law would not apply to "children whose [parents or guardians held] genuine and sincere religious beliefs [contrary to the mandate]."[134] The court found that the parents possessed religious beliefs that were "actively practiced in [their] home," which satisfied the court that the parents' religious beliefs were sincere.[135] Since the court additionally concluded that there was no "clear and present danger" of a particular communicable disease, the parents' application for a preliminarily injunction enjoining the school district from preventing their child from attending school was granted.[136] Other New York cases have followed this precedent.[137]

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128. *Id.* at 1180–81.

129. FLA. STAT. ANN. § 232.032(3) (repealed 2003).

130. Dep't of Health v. Curry, 722 So. 2d 874, 877 (Fla. Dist. Ct. App. 1998).

131. *See* Jones v. Wyo. Dep't of Health, 18 P.3d 1189, 1193, 1195 (Wyo. 2001) (holding that the Hepatitis B vaccination was optional and, in any event, the Health Department did not have statutory authority to require that a reason be given for a medical exemption to immunizations).

132. WILLRICH, *supra* note 14, at 314.

133. Brown v. City Sch. Dist. of Corning, 429 N.Y.S. 2d. 355 (Sup. Ct. 1980).

134. N.Y. PUB. HEALTH LAW § 2164(9) (McKinney 2012).

135. 429 N.Y.S. 2d. at 357.

136. *Id.*

A New York Family Court in *In re Christine M.* distinguished *Brown.*[138] The court held that a father's refusal to vaccinate his four-year-old daughter for measles was medical neglect because there was an enduring community measles epidemic.[139] This conclusion followed because, even though the father was a Church of God Seventh Day member and had "sincerely held" beliefs that were the foundation of his religious exemption claim, his convictions had "medical and scientific concerns" and his Church did not forbid vaccinations.[140] Interestingly, the court refused to mandate that the father vaccinate his child because, by the time the court's decision was made, the measles epidemic had subsided.[141] *Brown* and *In Re Christine M.* can be construed as implying that a constitutional right to religious exemption exists, even though the free exercise right is dramatically restricted in the face of public health interests to vaccinate.

C. Facing the Question: The Constitutional Free Exercise Right Does Not Exist

Despite the holdings of cases like *Brown*, in 2010, the United States District Court for the Eastern District of New York in *Caviezel v. Great Neck Public Schools* held that there was no constitutional right to religious exemption from mandatory vaccination laws.[142] The parents of a four-year-old claimed that they were entitled to a religious exemption from the New York public health law that allowed exemptions for those parents or guardians who held "genuine and sincere religious beliefs . . . contrary to the practices herein required."[143] The court came to this conclusion by applying the

137. *See, e.g.*, *In re* Moses v. Bayport Bluepoint Union Free Sch. Dist., No. 05 CV 3808(DRH)(ARL), 2007 WL 526610, at *5 (E.D.N.Y. Feb. 13, 2007) (denying a school district's motion for summary judgment on the basis that a jury could find that the parents had a sincere religious belief against mandatory vaccinations—implicitly supporting the idea of a right to religious exemptions); Bowden v. Iona Grammar Sch., 726 N.Y.S.2d 685, 686 (App. Div. 2001) (upholding preliminary injunction enjoining school from requiring student to be vaccinated, in part because "the religious exemption set forth in Public Health Law § 2164(9) is applicable to a private or parochial school" and because "plaintiffs may assert a cause of action to enforce their right to a religious exemption under the statute" (citing *Brown*, 429 N.Y.S.2d 355)).

138. *In re* Christine M., 595 N.Y.S.2d 606, 616 (N.Y. Fam. Ct. 1992).

139. *Id.* at 613.

140. *Id.* at 614–18.

141. *Id.* at 618.

142. Caviezel v. Great Neck Pub. Sch., 739 F. Supp. 2d 273, 285 (E.D.N.Y. 2010).

143. N.Y. PUB. HEALTH LAW § 2164(9) (McKinney 2012).

Supreme Court's public health and free exercise jurisprudence and by citing other district court cases that concluded society's interest in preventing the spread of disease trumped the right to free exercise.[144]

In 2011, the United States Court of Appeals for the Fourth Circuit held in *Workman v. Mingo County Board of Education*[145] that a mother was not entitled to exemption from the West Virginia law[146] requiring her daughter to be vaccinated before entrance into school. The plaintiff asserted that her case qualified for the hybrid-rights exception because her claim was one regarding "education-related laws that burden religion."[147] The court stated that, even though there was some disagreement about what level of scrutiny should apply and about the applicability of the hybrid-rights exception, this case was not one in which the hybrid-rights question needed to be addressed.[148]

Applying strict scrutiny, the *Workman* court held that West Virginia had a compelling interest in requiring children to be vaccinated before they were allowed to attend school; thus, even if this was a hybrid-rights case, the state would still prevail because the public health law satisfied strict scrutiny.[149] Like in *Caviezel*, the court also came to this decision primarily by broadly applying the Supreme Court's holding in *Jacobson* and the dicta in *Prince*.[150] Other courts have similarly deferred to the Court's dicta with little additional analysis in holding that the government prevails against parental claims for religious exemptions.[151]

D. A New Law-Medicine Perspective: The Free Exercise Right Can Exist

One court has engaged in analysis that other courts should use, even though the court's conclusion is open to question. In *Boone v.*

144. *Caviezel*, 739 F. Supp. 2d at 284–85 (citing Workman v. Mingo Cnty. Sch., 667 F. Supp. 2d 679, 689 (S.D. W. Va. 2009); Boone v. Boozman, 217 F. Supp. 2d 938, 953 (E.D. Ark. 2002); McCarthy v. Boozman, 212 F. Supp. 2d 945, 949–50 (W.D. Ark. 2002).

145. Workman v. Mingo Cnty. Bd. of Educ., 419 F. App'x 348 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 590 (2011).

146. W. VA. CODE ANN. § 16-3-4 (LexisNexis 2012).

147. *Workman*, 419 F. App'x at 353.

148. *Id.*

149. *Id.* at 353–54.

150. *Id.* at 353.

151. *See, e.g.*, Anderson v. State, 65 S.E.2d 848, 850 (Ga. Ct. App. 1951) (relying on *Jacobson* and holding that such statutes fall within legislative power); Brown v. Stone, 378 So. 2d 218, 222–23 (Miss. 1979) (applying *Jacobson*, *Zucht*, and *Prince* broadly and when mandatory school vaccination requirements "conflict[ed] with the religious beliefs of a parent," even if the parent's beliefs were sincere).

Boozman, a mother attempted to distinguish her claim—that her daughter was not required to be vaccinated against hepatitis B (HBV)—from that of *Jacobson* because there was no presently declared health emergency.[152] The District Court ruled that *Jacobson* was not limited to those diseases presenting a "clear and present danger" of spreading disease to society.[153] This court, unlike many others, discussed the nature, communicability, and consequences of the disease at issue. Although conceding that hepatitis B's communicability was different from that of smallpox because hepatitis B does not spread airborne as smallpox does, the court nevertheless described hepatitis B as a "dangerous" disease because of its consequences, citing the viral infection as the second leading cause of cancer.[154] The court held that the statute, which allowed objections based only on recognized religions, violated the mother's free exercise rights when she based her refusal on a religious "belief."[155] The court concluded that there was no compelling interest in preferring some religious sects and individuals over others, but the rest of the statute, which required immunization without a religious exemption, was constitutional.[156]

The tipping point for the *Boozman* court was that, because the groups at highest risk for the STI hepatitis B (presumably young adults) would not likely "self-identify and pursue the vaccine," immunizing "school children against Hepatitis B has a real and substantial relation to the protection of the public health and the public safety."[157] Thus, this court conducted an analysis that took into consideration the specific factors of particular vaccinations. This mode of analysis differs from the cases that used *Jacobson* and *Zucht* as blanket statements and from the decisions that quoted Supreme Court dicta to support that broad *Jacobson* and *Zucht* deference.

Post-*Smith*, courts have had different evaluations for when to allow religious exemptions and what the inquiry would look like, even when deciding that such exclusions would be allowed.

152. Boone v. Boozman, 217 F. Supp. 2d 938, 954 (E.D. Ark. 2002).

153. *Id.*

154. *Id.*

155. *Id.* at 947.

156. *Id.* at 954.

157. *Id.*

IV. TO EXEMPT: ARGUING FOR A LIMITED RIGHT TO RELIGIOUS EXEMPTION

With newly created vaccinations in the pipeline, including some that do not target communicable diseases in an epidemic context,[158] the list of mandatory vaccinations will get longer, and the issue of exemptions to the mandates will also grow. There are four possible approaches in determining the scope of religious exemptions: (1) overrule *Jacobson* and implement a new framework replacing *Jacobson*; (2) uphold and update *Jacobson*, requiring mandatory vaccinations with full religious exemption rights; (3) uphold and update *Jacobson*, requiring mandatory vaccinations and expressly declaring that religious exemptions should be withdrawn; or (4) uphold and update *Jacobson*, requiring vaccinations but only allowing religious exemptions from certain categories of compulsory vaccinations. This Part will reject the "overrule Jacobson" approach, the "full exemption" approach, and the "no exemption" approach. The conclusion is that the "limited exemption" approach will yield the best balance between individual civil liberties and the states' police powers.

A. Rejecting "Overrule Jacobson*" and Accepting "Update* Jacobson*"*

In addressing the Supreme Court's public health jurisprudence, there has been discussion about the applicability of *Jacobson* to today's society.[159] There is validity to the argument that the current public health precedent does not directly apply to vaccinations in the STI context. But with over a century of history and reliance on *Jacobson* and its progeny in the lower courts, it seems unlikely that *Jacobson* will be overruled and replaced by new framework. Thus, the following analysis focuses on why *Jacobson* does not precisely fit today's circumstances and should be updated.

When *Jacobson* was decided, Cambridge, Massachusetts, was undergoing a smallpox epidemic.[160] The nature and communicability of smallpox and STIs, for example, are quite different. Smallpox was a highly contagious disease and spread from casual contact.[161] STIs are not casually communicable diseases, requiring a certain situation for spread and infection to occur. The language that *Jacobson* used to describe the necessity for liberty to be conditional under times of

158. G. Pascal Zachary, *Vaccines and Their Promise Are Roaring Back*, N.Y. TIMES, Aug. 26, 2007, at B3.

159. *E.g.*, Note, *Toward a Twenty-First-Century:* Jacobson v. Massachusetts, 121 HARV. L. REV. 1820 (2008).

160. Jacobson v. Massachusetts, 197 U.S. 11, 12 (1905).

161. WILLRICH, *supra* note 14, at 22.

great pressure has an underlying tone of urgency, similar to that of a public emergency.[162]

Some medical professionals and public health advocates would analogize the situation at Cambridge in *Jacobson* to today's predicament, as our nation is currently undergoing a quiet yet powerful epidemic with STIs such as HPV infection.[163] However, the medical gap in danger and necessity between smallpox and STIs is still quite distinct. States have recognized the danger of infections that are not casually communicable, and legislation has incorporated vaccines addressing those types of infections.[164] But the key question involves deciding what kind of factors implicate the "public necessity" urgency that Justice Harlan emphasized in *Jacobson*.[165] This Note claims that "public necessity" does not apply to all mandatory vaccination requirements but rather that the medical distinctions between the diseases, predicated on science and logic, should be incorporated into the legal framework.[166]

Currently, mandatory vaccination cases have been immensely deferential to *Jacobson*, applying it broadly and expanding the scope of governmental power—including using *Jacobson* to justify compulsory sterilization.[167] But the scope of today's compulsory vaccination laws far exceeds what the Court could have imagined in the early 1900s. The Court's decisions were based on diseases such as

162. *Jacobson*, 197 U.S. at 27.

163. Richard A. Watson, *Human Papillomavirus: Confronting the Epidemic—A Urologist's Perspective*, 7 REVS. IN UROLOGY 135, 138–40 (2005).

164. *See* Karen R. Broder et al., *Preventing Tetanus, Diphtheria, and Pertussis Among Adolescents: Use of Tetanus Toxoid, Reduced Diphtheria Toxoid and Acellular Pertussis Vaccines*, MORBIDITY & MORTALITY WKLY. REP., Mar. 24, 2006, at 1, 7 (discussing the tetanus vaccine, which is a required immunization for children entering school, as a serious bacterial infection that is not a communicable disease); *see also* Eric E. Mast et al., *A Comprehensive Immunization Strategy to Eliminate Transmission of Hepatitis B Virus Infection in the United States*, MORBIDITY & MORTALITY WKLY. REP., Dec. 8, 2006, at 1 (describing the hepatitis B vaccine (HBV) and its targets of infection, which cannot be infected by casual contact).

165. *Jacobson*, 197 U.S. at 27.

166. *See infra* Part V.

167. Justice Holmes infamously relied on *Jacobson* to hold that "[t]he principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes . . . . Three generations of imbeciles are enough." *Buck v. Bell*, 274 U.S. 200 (1927) (upholding a state statute providing for the sterilization of those committed to mental institutions); *see* WILLRICH, *supra* note 14, at 334.

smallpox and measles and their sweeping effects.[168] At that time, knowledge about and technology targeting STIs were not available. Therefore, *Jacobson*, while significant and relevant, should not be considered a blanket rule applied to all current compulsory vaccination laws, as we have many mandates that were not implemented or even imaginable at that time.

But as one of the few Supreme Court precedents on public health and compulsory vaccination laws available, *Jacobson* is relevant to mandatory vaccination decisions in the STI context. One way to differentiate *Jacobson* from current developments in vaccine technology is that vaccines in the STI context, such as HPV vaccines, fall predominantly in the category of "self-protection" laws. "Self-protection" describes the idea that one is doing something to protect one's own interest or for one's own protection.[169] However, the underlying rationale of public health is "protection of society" and "for others," or "protection of the public."[170] Thus, the HPV vaccine, for example, is distinguishable from the public health rationale and *Jacobson's* underlying "protection of society" and "for others" justification, expressly referred to in Justice Harlan's necessity language,[171] because HPV needs intimate contact in order for the virus to be spread. Conversely, smallpox was spread easily through casual contact.[172] Thus, individuals who receive the HPV vaccine primarily use it to prevent the STI, and because HPV has such a tight association with cancers, especially cervical cancer, many view the HPV vaccine as also protecting themselves against cancer.[173]

168. *See id.* at 28, 32 (describing the terrifying and violent symptoms, mortality, and the permanent existence of smallpox scars on survivors).

169. *See* Lawrence O. Gostin, *The Future of Public Health Law*, 12 AM. J.L. & MED. 461, 462 (1986) (providing a foundation for the idea of "self-protection").

170. *Id.* at 483, 485.

171. Jacobson v. Massachusetts, 197 U.S. 11, 28 (1905) ("Smallpox being prevalent and increasing at Cambridge, the court would usurp the functions of another branch of government if it adjudged, as matter of law, that the mode adopted under the sanction of the State, to protect the people at large, was arbitrary and not justified by the necessities of the case.").

172. *See* WILLRICH, *supra* note 14, at 21 (describing the infectiousness of smallpox); *see also id.* at 239 (explaining that one homeless man swept Cleveland into a major smallpox outbreak).

173. *See Sexually Transmitted Diseases (STDs): Genital HPV Infection-Fact Sheet*, CTRS. FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/std/hpv/stdfact-hpv.htm (last updated Aug. 9, 2012) (providing information on the association between HPV and cancers); *see also* DIV. OF STD PREVENTION, DEP'T OF HEALTH AND HUMAN SERVS., CTRS. FOR DISEASE CONTROL AND PREVENTION, PREVENTION OF GENITAL HPV INFECTION AND SEQUELAE: REPORT OF AN

On the other hand, laws mandating HPV vaccine are also not pure "self-protection" laws because even though getting the vaccine means protecting oneself from infection, taking the vaccine also reduces the rapid spread of the STI to others. Thus, although *Jacobson* may not necessarily fit neatly within the context of vaccination technology innovations, *Jacobson* is at least relevant to mandatory vaccination decisions in the STI context, although perhaps not directly instructive. The above analysis, however, supports the contention that *Jacobson* should be updated.

B. Rejecting the "Full Exemption" Approach

The "full exemption" approach—that is, allowing all exemptions—would not be feasible because such a methodology would dismantle the fundamental goal of mass vaccination programs. Mandatory vaccination laws "employ[] the concept of *herd protection*, and hold[] that only a limited, statistically determined proportion of a population needs to possess individual immunity to a particular disease in order for the entire population to remain protected from the disease."[174] The idea is that vaccination laws apply to each person to protect the greater community; once a certain threshold number of people are vaccinated, then even if a small number of people are not vaccinated, the larger community is still protected.[175] Thus, if all religious exemptions from mandatory vaccinations were allowed, then the basis for vaccination laws could be destroyed, and the community would be left unprotected. On one hand, this result would occur only if the number of religious exemptions were so high that it put the community below the threshold and herd immunity is lost.[176] On the other hand, the immense presence of and rise in popularity of antivaccination sentiments makes the second approach a dangerous choice.

C. Rejecting the "No Exemption" Approach and Keeping "Limited Exemption"

In addressing the free exercise question—whether there is a constitutional right to religious exemptions from mandatory vaccination laws—most of the courts in compulsory vaccination cases have broadly applied *Jacobson* and the *Prince* dicta to mean any mandatory vaccination law satisfies the compelling governmental

EXTERNAL CONSULTANTS' MEETING 6 (1999), *available at* http://www.cdc.gov/std/hpv/HPVSupplement99.pdf (further information on HPV's relationship with cervical cancer).

174. HELLER, *supra* note 32, at 11.

175. *Id.*

176. *Id.*

interest test.[177] Thus, especially with *Smith*, it may be tempting to conclude that no right to religious exemptions from compulsory vaccination exists. Under that rationale, the "no exemption" approach of upholding *Jacobson* and mandating vaccines without allowing for religious exemptions seems appealing, especially with lower courts coming to the decision that no constitutional right to exemption exists.[178] On the contrary, this Note argues that the cases on conscientious objection from the military draft provide a convincing argument that there should be a statutory right to religious exemptions from compulsory vaccination laws, even though there may not be a constitutional right.[179] Thus, there are three compelling and mutually reinforcing reasons why state legislatures should, and most legislatures currently do, provide some form of religious exemptions from compulsory vaccination laws.[180]

From a historical and public policy standpoint, antivaccination sentiments have been a strong force since vaccinations were invented and forced upon others. The most adamant objections to vaccinations came from parents who had lost their children due to complications that they attributed to vaccines. One poignant example was Mrs. Caswell of Cambridge, Massachusetts, who lost her five-year-old daughter Annie to lockjaw during the smallpox outbreak that gave rise to the law that was upheld in *Jacobson*.[181] The death certificate listed tetanus as the cause of death, with vaccination as a contributing cause.[182] Contrary to the idea that those who protest mandatory vaccinations are just cranks and extremists, many citizens who object to compulsory vaccination laws are everyday American parents seeking what is best for their child.[183] Some may have strong

177. The *Prince* Court held that the parent's free exercise rights under the First Amendment were not violated, stating that "he cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds." Prince v. Massachusetts, 321 U.S. 158, 166 (1944). The Court supported this analogy to compulsory vaccination by saying, "The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death." *Id.* at 166–67.

178. Caviezel v. Great Neck Pub. Schs., 739 F. Supp. 2d 273, 285 (E.D.N.Y. 2010).

179. *See* Salmon & Siegel, *supra* note 11, at 289 (building on the idea of analogizing conscientious objection from conscription with exemption from compulsory vaccination laws).

180. *See supra* note 119.

181. WILLRICH, *supra* note 14, at 279.

182. *Id.*

183. *See supra* notes 4–5 and accompanying text.

religious or philosophical beliefs.[184] Some may just have fears.[185] There may be differences in opinion as to what is for the best; however, with the increasing frequency of individuals seeking exemption, legislatures have not repealed their religious exemption clauses in their mandatory vaccination statutes. This reflects the fact that the American constituency wants to keep the exemptions and preserve their civil liberties.

One example is the practical outcome of *Boone v. Boozman.*[186] The initial legal outcome of *Boozman* was that Arkansas's compulsory vaccination laws no longer contained religious or philosophical exemptions.[187] But removing the exemptions proved so unpopular that the provision was rewritten.[188] Today the law allows any parent to receive a religious or philosophical exemption.[189] Additionally, the fact that almost all states have religious exemptions and almost half have philosophical exemptions means that eliminating exemptions altogether would be immensely unpopular.[190] Thus, from a historical and political perspective, some form of religious exemption should be allowed.

Additionally, the *Prince* dicta and courts that broadly hold that individuals should not have the right to practice their religion at the expense of exposing the community and children to communicable diseases must be put into context.[191] The communicable diseases, illnesses, and deaths that the Court envisioned in *Jacobson* and *Prince* were the terrifying images of smallpox and the mass deaths that occurred when the epidemic hit the United States in the early 1900s.[192] Although STIs are an important public health challenge, their consequences are not the same as smallpox and diseases that fall

184. *See* Grady, *supra* note 1 (describing a mother's discomfort with the HPV vaccine because of its implications on her and her family's religious ideology and practices).

185. *See* Leblanc, *supra* note 5 (describing a worried mother willing to go far to protect her child from what she views as the dangers of vaccination).

186. 217 F. Supp. 2d 938 (E.D. Ark. 2002).

187. *See* Note, *supra* note 159, at 1831.

188. ARK. CODE. ANN. § 6-18-702(d)(4)(A) (2007); *see also* M. Craig Smith, Note, *A Bad Reaction: A Look at the Arkansas General Assembly's Response to* McCarthy v. Boozman *and* Boone v. Boozman, 58 ARK. L. REV. 251, 257–58 (2005).

189. ARK. CODE. ANN. § 6-18-702(d)(4)(A); *see also* Smith, *supra* note 188, at 258.

190. For states that have religious exemption clauses to their mandatory school vaccination statutes, see *supra* note 119. For states that have philosophical exemption clauses to their mandatory school vaccination laws, see *supra* note 121.

191. Prince v. Massachusetts, 321 U.S. 158, 166–67 (1944).

192. *Id.*

in the same category as smallpox. Thus, a right to religious exemption may not exist for diseases like smallpox, but such a right could exist for vaccinations against diseases like STIs.

To support the idea that there should be a right to obtain exemption from certain types of vaccinations, the military draft cases, including *Hamilton*, *Seeger*, *Welsh*, and *Gillette*, can be used as an analogy.[193] The Court in *Hamilton* concluded that conscientious objector status was a privilege that came "from the acts of Congress."[194] These military conscientious objection cases support the idea that each state's legislature should exercise discretion to provide religious exemptions to those who are genuine and sincere in their objections to legally mandated vaccinations. By including specific conditions for conscientious objections, which include (1) showing opposition to war, (2) because of religious beliefs, (3) that are sincere, this system creates a balance for preserving individual free exercise freedoms and serving the public interest.[195] Holders of nontheistic views and philosophical convictions were included in the definition of religion, as the Supreme Court allowed a broad scope for the definition of religion in these conscientious objection cases.[196] Having a similar specific system with narrower conditions to provide exemptions for those religiously opposed to vaccinations would analogously create a balance of individual free exercise rights and the public health interest. Thus, the inference from these draft cases is that legislatures authorized to pass laws of compulsion, including state and local authorities in mandatory vaccination cases, have the discretion to allow religious exemptions, and the legislatures should allow exemptions in certain specific situations.

Lastly, *Yoder*, which *Smith* specifically did not overrule and instead sought to distinguish, implies that the Free Exercise Clause is not dead.[197] There are two alternative routes to *Smith's* rational basis review: the hybrid-rights and *Hialeah* exceptions. Thus, current Supreme Court jurisprudence also does not seem to support eliminating religious exemptions altogether. From this analysis, the "limited exemption" approach has strong historical, political, and legal support; thus, this final approach should be the basis on which the legal framework is built.

193. *See* Salmon & Siegel, *supra* note 11, at 289 (using conscientious objection from conscription as a model).

194. Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245, 264 (1934).

195. Salmon & Siegel, *supra* note 11, at 289.

196. *Id.* at 293.

197. Wisconsin v. Yoder, 406 U.S. 205, 205 (1972).

V. A COMPROMISE: IMPLEMENTING A NOVEL LEGAL FRAMEWORK

The above discussion explains how the "limited exemption" approach will yield the best balance between individual civil liberties and the states' police powers. This approach involves upholding *Jacobson* and requiring vaccinations, but allowing religious exemptions from certain categories of compulsory vaccinations, which strikes a balance between maximizing individual civil liberties and allowing for a significant scope to state police powers. The analysis performed to reach this approach shows that *Jacobson* needs to be updated. One commentator has advocated this path and articulated a sound start for how to update *Jacobson* into a dual classification for necessity.[198] But there are some fundamental aspects to the dual system that need to be altered to create a working legal framework.

This Note argues for a three-tiered analysis to generate a novel legal framework for keeping religious exemptions in a subset of circumstances. The three tiers of analysis include (1) starting with a law-medicine perspective to separate the vaccines into two categories, (2) applying a constitutional analysis by explaining why the hybrid-rights exception should and can be used, and (3) advocating for certain policy considerations to fill the gaps.

A. Law-Medicine Analysis: Tweaking the Dual System

First, the dual path laid out by one commentator involves classifying vaccines into two categories, derived from the *Jacobson* necessity language.[199] The two categories are medically necessary and practically necessary vaccines.[200] "Medically necessary" vaccines are "the only known viable defenses against diseases taking hold in a community."[201] "Practically necessary" vaccines, on the other hand, are not the only possibility for addressing the disease, but the "alternatives are, in practice, not used by a significant number of people."[202] This categorization is too broad because there can always be other defenses and alternatives that are not widely used. This Note argues for incorporating a medical methodology along with the legal analysis to separate vaccines into these two original groups: medically and practically necessary vaccines.

The commentator points out, citing the smallpox vaccine in *Jacobson* as an example of a medically necessary vaccine, that "there was no other less coercive means available to [stamp out] the

198. Note, *supra* note 159, at 1834.

199. *Id.* at 1820.

200. *Id.*

201. *Id.*

202. *Id.*

outbreak."[203] But as an example of other means, public health official Friedrich was able to temporarily rid the city of Cleveland of smallpox through isolation and rigorous and systematic disinfection of houses.[204] Thus, there were other means—whether they were less coercive or not is debatable. The commentator also contrasts smallpox with HPV, citing the HPV vaccine as an example of a practically necessary one because there are easier alternative methods to protecting oneself, such as "sexual knowledge, disease screening, safe sex, and abstinence."[205] While stating that the line between medically and practically necessary vaccines will not always be clear, the commentator starts the analysis by generally delineating two categories.[206] But to actually apply the analysis, a law-medicine perspective must be used.

The rapid output of new medical information shows a strong link between HPV and various cancers and diseases.[207] Currently, the Centers for Disease Control and Prevention (CDC) statistics show that each year, about 12,000 women get cervical cancer in the United States, and almost all of these cancers are HPV associated.[208] Interpreting the "almost all" language in the CDC's statement, this means that HPV almost satisfies the condition of necessity because almost every person who has cervical cancer has HPV infection.[209] But just because those who have cervical cancer also have or have had HPV infection is not persuasive enough to satisfy the urgency that the *Jacobson* necessity standard implies: sufficiency is also important. HPV infection does not satisfy the sufficiency condition because not everyone who has HPV gets cervical cancer, and in fact a significant majority of women who are infected with HPV do not get cancer.[210] Thus, the distinction between smallpox and HPV, and what fits the necessity standard of *Jacobson*, is not whether there are

203. *Id.*

204. WILLRICH, *supra* note 14, at 239.

205. Note, *supra* note 159, at 1820.

206. *Id.*

207. *See* DIV. OF STD PREVENTION, *supra* note 173 ("High-risk types of HPV are found in ≥ 93% of cervical cancers worldwide . . . [and t]his body of epidemiologic and laboratory data is sufficiently strong that the International Agency for Research on Cancer and the National Institutes of Health have concluded that high-risk genital HPV types act as carcinogens in the development of cervical cancer.").

208. *Sexually Transmitted Diseases*, *supra* note 173.

209. *See* DIV. OF STD PREVENTION, *supra* note 173, at 6 ("[I]nfection with high-risk types appears to be 'necessary' for the development of cervical cancer").

210. *Id.*

alternative remedies for preventing the disease but rather the nature of the disease itself.

For example, infection with the variola virus was necessary for the development of smallpox because all those with smallpox were infected with the variola virus.[211] Additionally, those infected by the variola virus would inevitably get smallpox.[212] Therefore, infection by the variola virus was sufficient to get smallpox. Under this analysis of the nature of the disease alone, the danger surrounding smallpox infection and the necessity for the smallpox vaccine was much higher than for an HPV vaccine. The danger and necessity surrounding smallpox gave rise to *Jacobson*, and applying the *Jacobson* holding broadly to all successful vaccines would be inappropriate.

Instead of deeming vaccinations to be medically necessary because there are no other alternatives, and practically necessary because there are alternatives, the approach should be to emulate the type of analysis followed in *Boone*: evaluate the nature, communicability, and consequences of the disease that a vaccine would target.[213] The necessity analysis regarding the nature of the disease shows that the underlying rationale of *Jacobson*, which was targeted at infections like smallpox, does not fit infections like HPV.[214] Infections like HPV are communicable in noncasual settings and result in consequences less severe and immediate compared to infections like smallpox. Since infections like HPV do not pose the same danger as smallpox, the necessity for compulsory vaccination is not nearly as great as in *Jacobson*.

Although the *Boone* court's analysis was novel in that it targeted the nature, communicability, and consequence of the disease hepatitis B, the analysis faltered and ultimately failed because the law-medicine approach was not complete. Firstly, the *Boone* court came to the broad conclusion that, because high-risk groups would not likely "self-identify and pursue the [HBV] vaccine," immunizing would have a larger impact on public health and safety.[215] This does not fit the standard that was set forth in *Jacobson*. Justice Harlan articulated in *Jacobson* that "[u]pon the principle of self-defense, of paramount

211. *See* WILLRICH, *supra* note 14, at 21–23 (describing indirectly the infectiousness and causation between the variola virus and smallpox).

212. *Id.* at 23.

213. *See* Boone v. Boozman, 217 F. Supp. 2d 938, 954 (E.D. Ark. 2002) (addressing these aspects in regard to hepatitis B and providing a more in depth law-medicine analysis than other courts have).

214. Although the Supreme Court did not specifically analyze the necessity and sufficiency issue in *Jacobson*, the broad necessity standard that Justice Harlan articulated in his majority opinion emulates the logic behind the necessity and sufficiency analysis undertaken in Part V.A.

215. *Boone*, 217 F. Supp. 2d at 954.

necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members."[216] The *Boone* court stated that the *Jacobson* decision was not limited to those diseases presenting only a "clear and present danger."[217] But Justice Harlan used the words "paramount necessity," "self-defense," "epidemic," and "threatens," which all indicate danger and urgency. This seems to support the "clear and present danger" idea used in *Brown* and *Christine M.*, which were distinguished from each other but both held to this standard.[218]

Secondly, the *Boone* court discussed communicability of the disease briefly, stating that "Hepatitis B is spread by bodily fluids" and has a robust survival rate on surfaces, but the court did not carry the medical analysis further.[219] Spreading through bodily fluids means that hepatitis B can spread through contact with blood, semen, and vaginal fluids.[220] Thus, infection spreads through sexual contact with a person infected by HBV or shared needles. "[The] Hepatitis B . . . virus[ ] cannot be spread by casual contact, such as holding hands, sharing eating utensils or drinking glasses, breast-feeding, kissing, hugging, coughing or sneezing."[221] The nature and communicability of hepatitis B in comparison with a disease like smallpox is distinguishable, and while the *Boone* court referred to the distinction, the court did not seem to embrace the full depth of the medical dissimilarity.[222]

The court discussed the consequences of HBV, stating that the virus can lead to "sclerosis, scarring . . . of the liver, or liver cancer

216. Jacobson v. Massachusetts, 197 U.S. 11, 27 (1905). Justice Harlan used "necessity" twice more in his opinion in *Jacobson*, further highlighting the necessity standard that was set forth in this decision. *See id.* at 28, 30.

217. *Boone*, 217 F. Supp. 2d at 954.

218. *Compare* Brown v. City Sch. Dist. of Corning, 429 N.Y.S.2d 355, 357 (Sup. Ct. 1980) ("[T]he Court must be satisfied . . . that there is no present circumstance which, in the opinion of the public health authorities, represents a clear and present danger of the particular communicable disease."), *with In re* Christine M., 595 N.Y.S.2d 606, 618 (Fam. Ct. 1992) (declining to order inoculation because there was no "urgency" due to an epidemic or outbreak).

219. *Boone*, 217 F. Supp. 2d at 954.

220. *Hepatitis B*, MEDLINEPLUS, U.S. NAT'L LIBR. MED., http://www.nlm.nih.gov/medlineplus/ency/article/000279.htm (last updated Nov. 25, 2012).

221. *Hepatitis: Prevention*, N.Y. TIMES HEALTH GUIDE, http://health.nytimes.com/health/guides/disease/hepatitis/prevention.html (updated Sep. 29, 2010).

222. *Boone*, 217 F. Supp. 2d at 954 ("Even if such a distinction could be made [between smallpox and hepatitis B], the Court cannot say that Hepatitis B presents no such clear and present danger.").

after chronic infection,"[223] but the court did not analyze how this result leads to a similar situation of urgent necessity as a disease like smallpox. In a very general sense, HBV is fatal in about 1% of cases,[224] whereas "death may occur in up to 30% of [smallpox] cases."[225] But HBV and smallpox each have variances from their general and most common forms. A type of HBV characterized as acute HBV is fatal in approximately 0.5% to 1% of cases, and fatality results in about 15% of those infected with what is called chronic HBV infection (long-term infection cases) after childhood.[226] The most common form of smallpox variola major had an overall fatality rate of about 30%.[227] Flat and hemorrhagic smallpox, two types of variola major, were usually fatal, while variola minor ("a less common presentation of smallpox"), had death rates of 1% or less.[228] This level of insight into smallpox was not present in 1905 when *Jacobson* was decided.

This deeper understanding shows that there is a gray area in distinguishing the danger of HBV and smallpox when analyzing only the consequences of viral infection. Thus, the factors that *Boone* initially started to analyze, which include the nature, communicability, and consequences of the disease, should be analyzed completely in deciding whether a vaccine should fall into the category of medically necessary or practically necessary.[229] To be able to analogize and distinguish which vaccines should fall under medically necessary and which should fall under practically necessary, the viral infection should, like smallpox, be easily communicable and have severe consequences.[230] Furthermore, the target of the vaccine should be both necessary to develop into its targeted preventable disease and sufficient to do so in accordance with *Jacobson's* necessity

223. *Id.*

224. MEDLINEPLUS, *supra* note 220.

225. *Emergency Preparedness and Response: Questions and Answers About Smallpox Disease*, CTRS. FOR DISEASE CONTROL AND PREVENTION, http://www.bt.cdc.gov/agent/smallpox/faq/smallpox_disease.asp (last updated Mar. 13, 2009).

226. *See Hepatitis B Information for Health Professionals: Hepatitis B FAQs for Health Professionals*, CTRS. FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/hepatitis/hbv/hbvfaq.htm (updated Jan. 31, 2012).

227 *Emergency Preparedness and Response: Smallpox Fact Sheet*, CTRS. FOR DISEASE CONTROL AND PREVENTION, http://www.bt.cdc.gov/agent/smallpox/overview/disease-facts.asp (last updated Dec. 30, 2004).

228. *Id.*

229. *See* Boone v. Boozman, 217 F. Supp. 2d 938, 954 (E.D. Ark. 2002).

230. *See* Gostin, *supra* note 169, at 483 (arguing that a reasonably high standard of public harm should be required before public health intervention).

standard.[231] This logical construction is what the medical community relies on, and the legal community should do the same in evaluating medical decisions.[232]

An influential public health scholar, Lawrence Gostin, has argued that making inoculations like the HPV vaccine mandatory contributes to the concerns of parents about the safety of school-based vaccinations and may have negative consequences, like "heighten[ed] parental and public apprehensions."[233] Additionally, Gostin has stated that the major underlying basis for public health law is to prevent harm to the public and thus the threshold for public health intervention should be reasonably high.[234] Thus, Gostin and his camp would likely approve of having two categories of mandatory vaccinations—medically necessary vaccines and practically necessary vaccines—because separating the two types of vaccines using the *Jacobson* necessity standard more adequately aligns with the underlying public health rationale, and having fewer vaccinations on the mandatory list may decrease that public anxiety.[235]

B. Constitutional Analysis: Incorporating the Hybrid-Rights Exception into the Dual System

Once a law-medicine analysis is employed and the vaccines mandated are categorized as medically necessary or practically necessary, the next step is to evaluate the two categorizations of vaccines. If the vaccination mandate did not provide for exemptions, the claim for religious exemption would be based on the Free Exercise Clause.[236] The two major considerations for successfully bringing a

231. *See* Jacobson v. Massachusetts, 197 U.S. 11, 28 (1905) (containing necessity language by Justice Harlan).

232. *See* DIV. OF STD PREVENTION, *supra* note 173, at 6 (using necessity and sufficiency language in medical analysis).

233. Lawrence O. Gostin & Catherine D. DeAngelis, Editorial, *Mandatory HPV Vaccination: Public Health vs Private Wealth*, 297 JAMA 1921, 1922 (2007).

234. *See* Gostin, *supra* note 169, at 483 ("[T]he seriousness and probability of [harm to the public] should be the primary parameter for decision-making. The absence of any intention to serve the interests of the individual suggests that the threshold for public health action should be a reasonably high probability of serious harm to the public.").

235. *See Jacobson*, 197 U.S. at 28 ("We say necessities of the case, because it might be that an acknowledged power of a local community to protect itself against an epidemic threatening the safety of all, might be exercised in particular circumstances . . . in such an arbitrary, unreasonable manner, or might go so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere for the protection of such persons.").

236. *See* U.S. CONST. amend. I.

claim would be (1) scrutiny level and (2) the type of successful claim that can be brought.

1. Scrutiny Level: How to Get Around *Smith*

A successful claim for religious exemption from mandatory school vaccination laws would have to be a hybrid-rights claim because the compulsory school vaccination laws are neutral laws of general applicability under *Smith*.[237] If the claim were evaluated under *Smith*, the scrutiny level would be rational basis review, and the claim would not likely survive because most courts have stated that vaccination laws satisfy rational basis. Thus, the claim needs to be one of the other alternative routes so as to implicate a higher level of scrutiny. Those alternative routes are claims falling under *Hialeah* and the hybrid-rights exception. But vaccination laws are not discriminatory laws of the sort invalidated in *Hialeah*.[238] Thus, the only alternative is the hybrid-rights claim.

In the case of compulsory vaccination, the court should no longer apply the *Smith* rational basis test in the face of a hybrid-rights claim but rather should apply a higher standard—strict scrutiny.[239] While a law of general and neutral applicability is presumptively valid, when a hybrid-rights case is sufficiently similar to *Yoder*, the validity of the general and neutrally applicable law is questioned.[240] *Smith* also explains that the *Sherbert* test was created in a context that "lent itself to individualized governmental assessment of the reasons for the relevant conduct."[241] Like the unemployment compensation programs in *Sherbert*, this vaccination system creates a mechanism for individualized exemptions.[242] Thus, analogous to *Sherbert*, whether the State can infringe upon an individual's free exercise right should be evaluated under a compelling governmental interest test—the strict scrutiny standard. Assuming that a successful hybrid-rights

237. *See* Emp't Div. v. Smith, 494 U.S. 872, 879 (1990) (discussing laws that are neutral and of general applicability).

238. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534–35 (1993) (holding that the Hialeah ordinance was unconstitutional because the statute discriminated against those who practice Santeria).

239. *See* Hope Lu, Comment, *Addressing the Hybrid Rights Exception: How the Colorable-Plus Approach Can Revive the Free Exercise Clause*, 63 CASE W. RES. L. REV. 257, 279–80 (2012) (using the language of *Smith* to explain why strict scrutiny is logically the appropriate level of review for hybrid-rights claims).

240. *Id.* at 280.

241. Emp't Div. v. Smith, 494 U.S. 872, 884 (1990).

242. *See supra* Part V.A (discussing medically necessary and practically necessary vaccines).

claim triggers strict scrutiny, the next inquiry would be how to bring a successful hybrid-rights case.

2. Successfully Bringing a Hybrid-Rights Claim

Since both medically and practically necessary vaccinations would be mandated, the next threshold inquiry would be whether the hybrid-rights exception is a viable option. Although there has been significant controversy in the lower courts over what the Supreme Court truly meant by "hybrid" cases, there are three major approaches to the hybrid-rights exception that have been recognized: (1) the "refusal-to-recognize" approach, (2) the "independently viable" theory, and (3) the "colorable-claim" approach.[243]

After evaluating each approach for its likelihood of success as the basis of a hybrid-rights claim, the two approaches that may succeed in a claim for religious exemption from mandatory school vaccination laws are the independently viable claim and the colorable-claim approaches. For parents seeking to bring a hybrid-rights claim, which would likely be a free exercise claim coupled with the parents' fundamental right to raise their child, bringing such a claim in a court that recognizes the colorable-claim approach would likely be the most successful.

a. The Refusal-To-Recognize Approach

Some courts have refused to recognize the hybrid-rights claim, unless the Supreme Court gives express confirmation of the exception's validity.[244] This is now described as the "refusal-to-recognize" approach.[245] The United States Court of Appeals for the Sixth Circuit initially used this refusal-to-recognize approach in

243. *See* Lu, *supra* note 239, at 265–67; *see also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1262 (3d ed. 2006) ("Lower courts have done relatively little to clarify when a claim should be regarded as 'hybrid' under *Smith*."). There are some minor approaches that scholars have proposed as alternatives or solutions of the "best approach" for addressing the hybrid-rights exception. *See* Benjamin I. Siminou, Note, *Making Sense of Hybrid Rights: An Analysis of the Nebraska Supreme Court's Approach to the Hybrid-Rights Exception in* Douglas County v. Anaya, 85 NEB. L. REV. 311, 324 (2006) (describing another potential hybrid rights approach called the genuine implication theory); Lu, *supra note* 239, at 269–72 (discussing additional approaches that characterize some circuits' decisions, including the "open-recognition" approach). These approaches could also be successful in bringing a hybrid-rights claim in the compulsory school vaccination law context.

244. *See, e.g.*, Kissinger v. Bd. of Trs., 5 F.3d 177, 180 (6th Cir. 1993) (rejecting the application of strict scrutiny, or in fact anything higher than *Smith's* rational basis review, to a hybrid-rights case); Leebaert v. Harrington, 332 F.3d 134, 143 (2d Cir. 2003) (same).

245. Siminou, *supra* note 243, at 318.

Kissinger v. Board of Trustees,[246] where the court stated that the hybrid-rights exception was "completely illogical" because the level of scrutiny should not depend upon the number of constitutional rights claimed.[247] The court held that a public university's policy regarding the school's veterinary-medicine curriculum, which had a required course involving operations on live animals, did not need to meet any standard stricter than the standard in *Smith*.[248] Therefore, the court applied rational basis review.[249] The Second Circuit[250] and the Missouri Supreme Court[251] have also taken this view.[252]

In a jurisdiction that follows the "refusal-to-recognize" approach, a hybrid-rights claim seeking religious exemption from compulsory school vaccination laws would fail because the court would not recognize the hybrid-rights claim.

b. The Independently Viable Claim Theory

The independently viable claim approach to the hybrid-rights exception requires the free exercise right be conjoined with an accompanying claim that is independently viable in order for strict scrutiny to be triggered.[253] The courts that have been thought to take this approach are the United States Court of Appeals for the First Circuit and the District of Columbia Circuit, although whether the First Circuit followed the independent viability claim is debated.[254] In *EEOC v. Catholic University of America*,[255] the D.C. Circuit held

246. *Kissinger*, 5 F.3d at 177.

247. *Id.* at 180.

248. *Id.*

249. *Id.*

250. *See Leebaert*, 332 F.3d at 143–44 (agreeing with *Kissinger* that scrutiny level should not be dictated by the number of constitutional claims available to the plaintiff).

251. *See, e.g.*, Blakely v. Blakely, 83 S.W.3d 537, 547–48 (Mo. 2002) (en banc) (agreeing with *Kissinger* and that case's analysis).

252. *See* Lu, *supra* note 239, at 265–66, 273–74 (2012) (providing a more detailed explanation and review of the "refusal-to-recognize" approach).

253. *See* John L. Tuttle, Note, *Adding Color: An Argument for the Colorable Showing Approach to Hybrid Rights Claims Under* Employment Division v. Smith, 3 AVE MARIA L. REV. 741, 754 (2005) (discussing the approach taken by the First and D.C. Circuits).

254. *See* Note, *The Best of a Bad Lot: Compromise and Hybrid Religious Exemptions*, 123 HARV. L. REV. 1494, 1501 (2010) ("[T]he First Circuit may now be best understood to apply a different approach . . . ."); *see also* Lu, *supra* note 239, at 267, 269–70 (fleshing out the "independently viable" approach and discussing why the First Circuit's approach does not fall under this view any more).

255. EEOC v. Catholic Univ. of America, 83 F.3d 455 (D.C. Cir. 1996).

that a religious ministerial exception survived *Smith*, but if that was an incorrect conclusion, the holding was still valid because the plaintiff could use the hybrid-rights exception by joining her Free Exercise Clause claim with her independently viable Establishment Clause claim.[256]

The independently viable claim may be successful if brought in a court that recognizes this approach; however, this theory may not be the most suitable approach because it is fundamentally and logically flawed. If each claim can be brought independently, then the existence of a hybrid-rights exception is not needed.[257] The plaintiff could just bring each claim forward on its own. Additionally, it might be difficult for a parent to argue an independently viable claim.

c. The Colorable-Claim Standard

The last major approach is the colorable-claim standard.[258] In order to qualify for a hybrid-rights exception, the colorable-claim standard requires that a plaintiff with a free exercise claim join that claim with a "colorable claim" that an accompanying constitutional right has also been violated—"colorable" meaning that there is a "likelihood . . . of success on the merits."[259]

The colorable-claim approach was formulated from a case decided in the United States Court of Appeals for the Tenth Circuit, *Swanson v. Guthrie Independent School District No. 1-L*.[260] The Tenth Circuit concluded that even though *Smith* was not particularly instructive about the application of the hybrid-rights exception, for such a hybrid-rights claim to be brought there had to be "at least [a] require[d] colorable showing of infringement of recognized and specific constitutional rights, rather than the mere invocation of a general right."[261] In other words, a colorable claim did not require a clear and blatant violation of an accompanying constitutional right, but it did require more than a general allegation.[262] But this court did not

256. *Id.* at 466–68.

257. *See* Sherbert v. Verner, 374 U.S. 398, 410 (1963) (stating that because the independent free exercise claim succeeded, the Court did not have reason to analyze the equal protection claim as well).

258. *See, e.g.*, Catholic Charities of Albany v. Serio, 859 N.E.2d 459, 465 (N.Y. 2006) (rejecting the hybrid rights approach because the claim of free speech in addition to the free exercise challenge was "insubstantial").

259. Miller v. Reed, 176 F.3d 1202, 1207 (9th Cir. 1999) (citing Thomas v. Anchorage Equal Rights Comm'n., 165 F.3d 692, 703, 707 (9th Cir. 1999), *vacated*, 220 F.3d 1134 (9th Cir. 2000) (en banc)).

260. Swanson v. Guthrie Indep. Sch. Dist. No. 1-L, 135 F.3d 694 (10th Cir. 1998).

261. *Id.* at 700.

262. *Id.*

actually apply the hybrid-rights exception because the plaintiffs did not meet the showing of a colorable claim.[263] The colorable-claim approach was then adopted by the Ninth Circuit,[264] which in a line of cases affirmed the standard[265] and concluded that a colorable claim of an accompanying constitutional violation served to hybridize the companion claim with the plaintiffs' free exercise action.[266]

There are criticisms of the logic of the colorable-claim approach.[267] One criticism is that the approach of adding two failing claims to create a winning claim is illogical.[268] But this perspective arises when the free exercise claim and the additional constitutional claim are viewed as completely separate claims. This criticism can be resolved by shifting the viewpoint of the "colorable-claim" approach to the "colorable-plus" approach.[269] The colorable-plus approach adopts the rationale of the First Circuit's 2008 decision in *Parker v. Hurley*, which stated that each part of a hybrid-rights claim should be reviewed interdependently rather than separately.[270] For example, a parent's claim regarding religious exemptions from compulsory school vaccination laws would likely include a free exercise claim and a claim concerning the parent's fundamental right to raise her child. These two claims, whether a parent's right to exercise her religion freely and raise her child under those religious beliefs has been violated, are "sets of interests [that] inform one [an]other" and are interrelated.[271]

263. *See id.* ("Based on the foregoing, we hold that Defendants were not required to show a compelling state interest in this case, despite Plaintiffs' attempt to invoke the hybrid-rights doctrine.").

264. *See Thomas*, 165 F.3d at 704–05 (applying the colorable-claim test after an in-depth analysis of the other available approaches and hybridizing the case). *Thomas* was vacated en banc due to lack of ripeness. 220 F.3d 1134, 1137.

265. *See* Miller v. Reed, 176 F.3d 1202, 1207 (9th Cir. 1999) (affirming the standard set out in *Thomas*).

266. *See* Axson-Flynn v. Johnson, 356 F.3d 1277, 1297 (10th Cir. 2004) (also affirming the *Thomas* standard and using the colorable-claim test because it is a middle ground solution).

267. *See* Note, *supra* note 254, at 1505 (criticizing the colorable-claim approach); *see also* Lu, *supra* note 239, at 276–77 (explaining criticisms of the colorable-claim approach).

268. Note, *supra* note 254, at 1505.

269. *See* Lu, *supra* note 239, at 278–79 (introducing the idea of the colorable-plus approach).

270. *Id.*; *see also* Parker v. Hurley, 514 F.3d 87, 98 (1st Cir. 2008) ("[T]he Court did not analyze separately the due process and free exercise interests of the parent-plaintiffs, but rather considered the two claims interdependently . . . .").

271. *Parker*, 514 F.3d at 98.

Because these interests inform one another and are so intertwined, it is logical and desirable to view these claims together to determine whether cumulatively the claims are strong enough to serve as the basis of a hybrid-rights claim.[272] Thus, the colorable-plus approach views the free exercise claim and the additional colorable constitutional claim in totality, rather than separately, to reach the question of whether a hybrid rights claim is available.

The colorable-plus standard is fundamentally more desirable than any other approach. This approach is stronger than the refusal-to-recognize approach because the latter ignores the fact that the Supreme Court developed the hybrid-rights idea in *Smith*.[273] The colorable-plus approach is also stronger than the independently viable claim approach because the former standard does not create the same logical fallacy that the independently viable claim does and resolves the criticism against the colorable-claim approach. Thus, assuming that a compulsory vaccination case can be viewed as a hybrid-rights case through the colorable-plus approach, the next inquiry is whether strict scrutiny is satisfied.

3. Strict Scrutiny: Medically Necessary, Not Practically Necessary

Even though strict scrutiny is implicated, the strict scrutiny standard is not always fatal to the government's case, as was depicted in *Prince*. Even under a standard comparable to strict scrutiny, the Supreme Court in *Prince* upheld child labor regulations against a woman who allowed her children to sell religious magazines on the street.[274] Similarly, separating mandatory vaccinations into medically necessary and practically necessary shows that, in the face of a hybrid-rights claim, medically necessary vaccinations would meet strict scrutiny analysis and practically necessary vaccinations would not.

Medically necessary vaccinations satisfy strict scrutiny because they meet the necessary and sufficiency standards. If a vaccine is both necessary and sufficient, satisfying that high standard of necessity should meet the *Jacobson* public necessity standard. As many courts have found, and as the Court has expressed itself, if the law satisfies the *Jacobson* standard of necessity, then it is within the government's police powers to enforce that law. In other words, satisfying *Jacobson* satisfies strict scrutiny. Because medically necessary vaccinations meet the *Jacobson* necessity standard, medically necessary vaccinations withstand strict scrutiny.

272. *See generally* Lu, *supra* note 239, at 275–82 (for a deeper discussion of the arguments and rationale for the colorable-plus approach).

273. For Justice Scalia's language about the hybrid rights theory, see *Emp't Div. v. Smith*, 494 U.S. 872, 881 (1990).

274. *See* Prince v. Massachusetts, 321 U.S. 158, 162 (1944).

On the other hand, practically necessary vaccinations do not meet the necessary and sufficiency standards and thus do not satisfy the *Jacobson* necessity standard. Thus, practically necessary vaccinations would not satisfy strict scrutiny. Therefore, when plaintiffs that bring hybrid-rights claims, courts should grant religious exemptions from practically necessary vaccinations but not medically necessary ones.

CONCLUSION: APPLYING THE FRAMEWORK AND RELEVANT POLICY CONSIDERATIONS

With the recent developments in our understanding of HPV and its vaccine,[275] legislation trying to mandate HPV vaccination has been introduced in the majority of states—forty-one.[276] Virginia[277] and the District of Columbia[278] have enacted HPV vaccine mandates. Texas did as well but later revoked it. [279] Both Virginia and the District of Columbia offer lenient exemptions at the discretion of parents. Virginia allows religious exemptions from mandatory vaccines unless a public health emergency or epidemic is declared.[280] The District of Columbia has exemptions for any reason with a letter from a parent or guardian.[281] Thus, legislatures recognize that vaccinations against STI are a significant medical accomplishment. But significance does not equal necessity. This Note argues that vaccines targeting STIs, like HPV vaccines, do not fall into the category of medically necessary vaccinations because of an assessment of the nature, communicability, and consequences of the infection. Therefore, states should use several policy tools to fill the gaps.

Public health agencies should use current marketing and social networking tools to educate the public. For example, labeling HPV vaccine as an anticancer vaccine creates a misconception. HPV vaccine does significantly decrease the likelihood of a woman getting

275. *See* NCSL, *supra* note 2 (discussing the effects of HPV and the strains that the vaccine effectively treats).

276. *See id.*

277. VA. CODE ANN. § 32.1-46 (West 2011).

278. D.C. CODE § 7-1651.04 (2011).

279. Lawrence O. Gostin, Commentary, *Mandatory HPV Vaccination and Political Debate*, 306 JAMA 1699, 1699 (2011) (detailing 2011 presidential candidate Michele Bachmann's challenge against adversary Rick Perry's executive order mandating the HPV vaccine for girls, which the Texas legislature later revoked because of backlash from constituents).

280. *See* VA. CODE ANN. § 32.1-46 (describing Virginia's statute on religious exemptions from mandatory vaccinations).

281. *See* D.C. CODE § 7-1651.04 (describing Washington D.C.'s statute on religious exemptions from mandatory vaccinations).

cervical cancer—but only cervical cancer that is closely associated with certain types of high-risk HPVs.[282] The tight association between HPV and cervical cancer should push states to work with drug companies to market this vaccine as an antiviral vaccine that prevents almost all HPV-associated cervical cancers.[283] But HPV vaccine is a vaccine for the virus, not for the cancer. Getting the HPV vaccine does prevent the spread of HPV.[284] However, preventing the spread of HPV does not necessarily mean that someone will not then get cervical cancer.[285] This is the root of the necessary and sufficient discussion. Agencies should use updated social networking tools to share this information so today's youth understand that, while receiving the HPV vaccine does significantly reduce the risk of cervical cancer, the HPV vaccine does not target other STIs and does not prevent all cancers. This discrepancy between association and causation is precisely why HPV vaccine is a practically necessary vaccination, not medically necessary vaccination.

The Internet has also drastically affected the vaccine dialogue.[286] Antivaccinationists use the Internet to spread information and garner support for their cause.[287] The government and public health community should do the same and use social media to educate the public about STIs and how to prevent the spread of infection. Creating Facebook groups that offer accurate, concise, and understandable information about what HPV is and what the vaccine does can increase the visibility of the positive public health implications. Using Twitter to document public health statistics regarding the HPV growth rate would be eye-opening (and alarming) for young adults.

The vaccine narrative is an age-old issue, but the emergence of novel biomedical technology that enhances our understanding of diseases has added another layer of complexity to the legal analysis. STI vaccines raise the need for different First Amendment analysis because the diseases these vaccines target present a less compelling governmental interest than the vaccines of *Jacobson*'s time, such as smallpox. Courts currently assume that *Jacobson* stands for the proposition that compulsory vaccination laws satisfy the compelling governmental interest and this standard applies to all types of vaccines. But the majority of decisions have overlooked the fact that

282. *See* DIV. OF STD PREVENTION, *supra* note 173, at 6 (showing tight association between high risk HPV types and cancers).

283. *See Sexually Transmitted Diseases*, *supra* note 173.

284. *See* DIV. OF STD PREVENTION, *supra* note 173, at 6 (discussing necessity and sufficiency between HPV and cervical cancer).

285. *Id.*

286. WILLRICH, *supra* note 14, at 343.

287. *Id.*

new biomedical vaccines may target certain types of illnesses that do not satisfy the compelling governmental interest test. Thus, the government is increasing its regulatory scope in areas that are in tension with First Amendment civil liberties—in this case, the right to exercise one's religion.

This Note argues that the public health analysis is currently ill defined and needs to be updated. Once updated, a law-medicine perspective and the constitutional hybrid-rights exception can salvage a free exercise claim against compulsory vaccination laws. The Supreme Court's jurisprudence, the disarray of lower court decisions, and the imprecise state statutory frameworks have led to overly broad regulatory power. After analyzing the four potential avenues for the scope of an exemption allowance, this Note argues that individual civil liberties must be balanced with state police powers. After conducting historical, policy, and legal analyses, these evaluations show that a right to exemption from compulsory vaccination laws should exist, even if it is not necessarily a constitutional right and even if such a right can only exist in a limited situation.

Building upon the limited-exemption framework, this Note advocates a three-tiered free exercise analysis that can be extrapolated to other biomedical advances in vaccinations that have not yet surfaced: (1) using a law-medicine analysis to categorize vaccinations into medically necessary vaccines and practically necessary vaccines; (2) using a constitutional analysis by applying strict scrutiny under the hybrid rights exception, with only medically necessary vaccines satisfying that standard and thus allowing exemptions for only practically necessary vaccines; and (3) using policy to fill the gaps for practically necessary vaccines, which can include effective marketing decisions and public health tools. Thus, the law-medicine perspective and the hybrid-rights exception effectively salvage a limited free exercise right in the face of compulsory vaccination laws.

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APPENDIX

Table 1. The Status of Each State's Mandatory Vaccination Laws[288]

State	Statutory Source	DPT	MMR	Polio	Hib	Hep B	Var	Religious Exemptions	Philosophic Exemption
AL	Ala. Code § 16-30-1	•	•	•			•	§ 16-30-3	
AK	Alaska Admin. Code § 06.055	•	•	•	•		•	§ 06.055	
AZ	Ariz. Rev. Stat. Ann. § 15-872	•	•	•	•	•		§ 15-873	•
AR	Ark. Code Ann. § 6-18-702	•	•	•			•	§ 6-18 -702	
CA	Cal. Health & Safety Code § 120325	•	•	•		•	•	§ 120365	•
CO	Colo. Rev. Stat. § 25-4-902	•	•	•		•	•	§ 25-4-903	
CT	Conn. Gen. Stat. § 10-204a	•	•	•		•	•	§ 10-204a	
DE	Del. Code Ann. tit. 14 § 131	•	•	•		•	•	§ 14-131	
DC	D.C. Code Ann. § 38-501*	•	•	•	•	•	•	§ 38-506	
FL	Fla. Stat. Ann. § 1003.22*	•	•	•		•	•	§ 1003.22*	
GA	Ga. Code Ann. § 20-2-771	•	•	•	•	•	•	§ 20-2-771	
HI	Haw. Rev. Stat. § 302A-1154	•	•	•		•	•	§ 302A-1156	
ID	Idaho Code § 39-4801	•	•	•		•		§ 39-4802	•
IL	105 Ill. Comp. Stat. § 5/27-8.1*	•	•	•		•		§ 5/27-8.1*	
IN	Ind. Code Ann. § 21-40-5	•	•	•		•		§ 21-40-5-6*	*
IA	Iowa Code Ann. § 139A.8*	•	•	•				§ 139A.8*	
KS	Kan. Stat. Ann. § 72-5209	•	•	•			•	§ 72-5209	
KY	Ky. Rev. Stat. Ann. § 214.034	•	•	•		•	•	§ 214.036	
LA	La. Rev. Stat. Ann. § 17:170(A)	•	•	•			•	§ 17:170(E)	•
ME	Me. Rev. Stat. Ann. tit. 20-A § 6355	•	•	•			•	20-A § 6355	•
MD	Md. Code Ann. Educ. § 7-403	•	•	•		•	•	§ 7-403	
MA	Mass. Gen Laws ch. 76, § 15	•	•	•		•	•	ch. 76, § 15	

288. Table adapted from James G. Hodge & Lawrence O. Gostin, *School Vaccination Requirements: Historical, Social, and Legal Perspectives*, 90 KY. L.J. 831, 869 (2002). Updates on statutes and which exemptions are offered adapted from *States with Religious and Philosophical Exemptions from School Immunization Requirements,* NAT'L CONFERENCE OF STATE LEGISLATURES (Dec. 2012), http://www.ncsl.org/Default.aspx?TabId=14376. Asterisk indicates an update from Hodge & Gostin. Vaccine abbreviations are as follows: DPT (diphtheria, pertussis, and tetanus), MMR (measles, mumps, and rubella), Polio (poliomyelitis) Hip (Haemophilus influenzae type B), Hep B (hepatitis B), Var (varicella).

State	Statute	DPT	MMR	Polio	Hib	Hep B	Var	Religious Exemptions	Philosophic Exemption
MI	Mich. Comp. Laws Ann. § 333.9208	•	•	•		•	•	§ 333.9215	•
MN	Minn. Stat. Ann. § 121A-15	•	•	•		•		§ 121A.15	•
MS	Miss. Code Ann. § 41-23-37	•	•	•			•	*None*	
MO	Mo. Rev. Stat. § 167.181	•	•	•		•		§ 167.181	
MT	Mont. Code Ann. § 20-5-403	•	•	•				§ 20-5-405	
NE	Neb. Rev. Stat. Ann. § 79-217	•	•	•				§ 79-221	•
NV	Nev. Rev. Stat. § 392.435	•	•	•				§ 392.437	
NH	N.H. Rev. Stat. Ann. § 141-C:20-a	•	•	•		•		§ 141-C:20-c	
NJ	N.J. Stat. Ann. § 26:1A-9	•	•	•				§ 26:1A-9	
NM	N.M. Stat. Ann. § 24-5-1*	•	•	•				§ 24-5-3*	
NY	N.Y. Pub. Health Law § 2164	•	•	•		•		§ 2164	
NC	N.C. Gen. Stat. § 130A-155	•	•	•		•		§ 130A-157	
ND	N.D. Cent. Code § 23-07-17.1	•	•	•				§ 23-07-17.1	•
OH	Ohio Rev. Code Ann. § 3313.671	•	•	•		•		§ 3313.671	•
OK	Okla. Stat. Ann. tit. 70, § 1210.191	•	•			•	•	§ 1210.192	•
OR	Or. Rev. Stat. § 433.267	•	•	•	•	•	•	§ 433.267	
PA	28 Pa. Code § 23.81*	•	•	•		•	•	§ 23.84	•*
RI	R.I. Gen. Laws § 16-38-2	•	•	•	•	•	•	§ 16-38-2	
SC	S.C. Code Ann. § 44-29-180	•	•	•		•	•	§ 44-29-180	
SD	S.D. Codified Laws § 13-28-7.1	•	•	•			•	§ 13-28-7.1	
TN	Tenn. Code Ann. §49-6-5001	•	•	•			•	§ 49-6-5001	
TX	Tex. Educ. Code Ann. § 38.001*	•	•	•	•	•	•	§ 38.001(c)(1)(B)*	•*
UT	Utah Code Ann. § 53A-11-301*	•	•	•		•	•	§ 53A-11-302	•*
VT	Vt. Stat. Ann. tit. 18, § 1121	•	•	•				§ 1122	•
VA	Va. Code Ann. § 22.1-271.2	•	•	•			•	§ 32.1-46(D)(1)*	
WA	Wash. Rev. Code Ann. § 28A.210.080	•	•	•		•		§ 28A.210.090*	•
WV	W. Va. Code § 16-3-4	•	•	•				*None*	
WY	Wyo. Stat. Ann. § 21-4-309	•	•	•				§ 21-4-309	

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